Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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84-1226

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHROGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, and ROGER T. ERICKSON,

Petitioners

v.

THE SECRETARY OF STATE OF THE STATE OF CALIFORNIA, ASSEMBLY OF THE STATE OF CALIFORNIA, AND THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,

and

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 30, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The California Legislature, which had substantial Democratic majorities in both its houses, enacted a statute dividing the state into congressional districts in a way that petitioners, active California Republicans, assert constitutes an egregious gerrymander, diluting the force of their votes by impairing the ability of Republicans to obtain fair representation in Congress. Petitioners promptly filed an action in a United States district court challenging the redistricting on federal constitutional grounds and raising in addition pendent state law claims. The three-judge district court decided to abstain from adjudicating petitioners' complaint pending resolution of the state law claims in a state court. After the affirmance of that decision by the court of appeals, petitioners presented their state law claims to the California Supreme Court, which declined to hear them. Petitioners then filed an amended complaint in the federal court deleting the state law claims. Upon petitioners' request to reassert jurisdiction, the district court, affirmed again by the court of appeals, nevertheless continued its abstention.

Under these circumstances, the question presented is the lawfulness of the three-judge district court's abstention from its duty of adjudicating claims properly brought before it, which for nearly two years—through an entire congressional election cycle—has prevented petitioners from obtaining a decision on their substantial claim of an unconstitutional impairment of their voting rights by means of a gross political gerrymander.

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THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Congressman Robert E. Badham, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 1, 1984.

OPINIONS BELOW

The memorandum opinion of the court of appeals, which by order of that court will not be reported, is set forth at pages 1a-3a of the Appendix to this petition. The opinion of the district court, dated June 19, 1984, is not yet reported. It is set forth at pages 4a-15a of the Appendix, along with a dissenting opinion at pages 16a-20a. The Appendix also includes an earlier, related order of the court of appeals in this case, dated December 12, 1983 (pp. 23a-24a), and a September 26, 1983 opinion (pp. 27a-35a), reported at 721 F.2d 1170; an opinion of the district court, dated June 20, 1983 (pp. 36a-45a), reported at 568 F. Supp. 156; and an order of the Supreme Court of the State of California, dated October 27, 1983 (pp. 25a-26a).

JURISDICTION

The most recent judgment of the Court of Appeals for the Ninth Circuit was entered on November 1, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case arises under: (a) Article I, Section 2, of the Constitution of the United States which provides in pertinent part, that Members of the United States House of Representatives be chosen "by the People of the several states," (b) Section 1 of the Fourteenth Amendment of the Constitution of the United States which provides in pertinent part: "No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . ," and (c) The First Amendment of the Constitution of the United States which states in pertinent part: "Congress shall make no

law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances . . . ."

STATEMENT OF THE CASE

In the fall of 1981, following the decennial census of 1980, the California Legislature enacted a statute redistricting the state[1] into 45 congressional districts, which was two more districts than California was apportioned in the 1970s. Members of the Democratic Party controlled both houses of the legislature and the governorship. An outcry quickly arose over the congressional districts because they appeared to be, and were cynically acknowledged to be, a blatant political gerrymander. Over one million signatures were collected to subject the congressional redistricting law to a referendum of the voters.[2] In June 1982, despite a Democratic majority in voter registration, the voters overwhelmingly disapproved and thereby invalidated the redistricting scheme. Though the Supreme Court of California directed that the 1982 congressional elections be conducted on the basis of the plan the voters had disapproved, the legislature had to enact a new plan for the 1984 elections.

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[1] Assembly Bill 301 (A.B. 301), 1981 Legislature, Chap. 535, 1981 Stats.

[2] This automatically prevented A.B. 301 from going into effect. Calif. Const. Article II, § 10(a). When it became clear that enough citizens had signed the petitions to qualify the referendum for the ballot, the Assembly, Senate Democrats, and the Democratic congressional delegation filed original petitions for mandate with the Supreme Court of California seeking to block the referendum election and/or to obtain an order mandating the use of the A.B. 301 districts on an interim basis for the 1982 elections, regardless of the outcome of the referendum. A bitterly divided court granted the latter request and ordered A.B. 301 districts to be used in the 1982 congressional election. *Assembly* v. *Deukmejian*, 30 Cal.3d 638 (1982).

The legislature paid little formal attention to the issue of congressional redistricting until, in the election of November 1982, a Republican was elected Governor. With less than 60 days remaining in his term of office, Democratic Governor Edmund G. Brown, Jr., called the legislature into special session beginning on December 6, 1982. On that day, a skeletal congressional redistricting bill (simply a "vehicle" bill without any substance), Assembly Bill 5X (A.B. 5X), was introduced in the Assembly, the lower house of the legislature. No hearings were held on this bill, and no delineations of district lines were placed in the bill until December 27, 1982, when these were added by amendment on the Assembly floor.

One day later, the bill passed the Assembly on a party-line vote of 41 to 29. Because of a California constitutional requirement (Calif. Const. Art. IV, Section 8(b)) that a bill be read on three separate days prior to final passage, A.B. 5X could not be approved by the California Senate in time to be signed by the lame duck Governor in his last hours in office. In order to get a bill on the desk of the outgoing Governor, the Senate majority requested that, on the morning of December 29, 1982, another bill, Assembly Bill 2X (A.B. 2X) (which redrew the districts of State Board of Equalization members, a totally separate issue), be removed from Governor Brown's desk and returned to the Senate. A.B. 2X was then amended to include the congressional districts contained in A.B. 5X, as already passed by the Assembly. In neither legislative house were committee hearings held off the subject of congressional redistricting.[3]

On the evening of December 29, the Senate bill passed by a party-line vote of 21 to 10. That same evening, the

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[3] Nor was there time allowed to review the proposed districts, which were described by reference to thousands of census tracts.

Assembly concurred in the Senate amendments, on a strict party-line vote. The margins in the two houses were the two-thirds necessary to add an urgency clause (Calif. Const. Art. IV, Sec. 8(c)), which prevented the enactment from being subjected to another referendum. On January 2, 1983, just a few hours before leaving office, Governor Brown signed A.B. 2X into law.

On March 8, 1983, petitioners (plaintiffs below) filed their complaint against A.B. 2X in the United States District Court for the Northern District of California. Petitioners are members of an identifiable, quantifiable and politically salient group of individuals—registered Republicans and voters who tend to vote for Republican candidates—whose voting strength has been diluted by A.B. 2X. The named defendant was the California Secretary of State, the state's chief elections official, and an elected Democrat. A three-judge court was convened pursuant to 28 U.S.C. § 2284. Shortly thereafter, the Assembly petitioned for and was granted leave to intervene; no Republican members of the Assembly were consulted about, or concurred in, the intervention. The California Democratic congressional delegation also intervened in support of the enactment.

The complaint raised federal equal protection, freedom of association, due process, and "one person, one vote" challenges to A.B. 2X. Also included were several pendent state law claims arising from the haste in which the statute passed the legislature. So hasty, indeed, was the process that "technical corrections" had to be made by the California Secretary of State, resulting in sizable shifts of population from one district to another, to reduce the redistricting plan's population deviations to what could plausibly be argued to be constitutionally acceptable levels. These "corrections" were made without any legislative action and announced publicly after peti-

tioners' complaint was filed. The complaint was then amended to assert the illegality of the "technical corrections" process.[4]

The intervenor Democratic congressional delegation moved for a stay of the federal court proceedings, asking the court to abstain from adjudicating petitioners' complaint pending resolution of the state law issues in a state court. At the same time, the delegation filed suit in the state's most congested trial court, the Superior Court of the County of Los Angeles, asking for a declaration that A.B. 2X was legal and constitutional. Since that date, the delegation has not prosecuted that suit.

On June 20, 1983, the district court issued its order to abstain from deciding the federal issues in this case, upon the rationale of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). The court decided to "abstain until the state law issues are settled by the state court" and "retain jurisdiction to resolve whatever federal issues remain." (P. 45a, *infra.*)[5]

On June 22, 1983, this Court issued its decision in *Karcher* v. *Daggett*, 103 S.Ct. 2653 (1983), striking down New Jersey's congressional redistricting scheme. Petitioners immediately requested the district court to reconsider its decision in light of *Karcher*. The district court denied the petition. (Pp. 34a-35a, *infra.*)

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[4] As passed by the legislature, A.B. 2X contained an overall population deviation of 3.283%, which was reduced to .0538% by the Secretary's changes. (*See* p. 37a, *infra.*)

[5] As will be discussed *infra*, this approach is markedly different from that taken by federal courts nationwide. *See, especially, Bandemer* v. *Davis*, Nos. IP 82-56-C, IP 82-164-C (S.D. Ind. Dec. 13, 1984), the direct appeal of which is pending to this Court. (Notice of appeal filed January 11, 1985.) While *Bandemer* is remarkably similar to this case, the two cases have received remarkably dissimilar treatment by their respective federal courts.

Petitioners appealed to the court of appeals and, as a precaution, also petitioned for a writ of mandamus addressed to the district court's abstention ruling. (*See*, pp. 28a-29a, *infra.*) On September 26, 1983, the Ninth Circuit affirmed the district court's abstention order, but indicated that petitioners could return to that court if the state courts did not act with reasonable speed. (Pp. 27a-35a, *infra.*)

On September 30, 1983, just four days after the court of appeals' decision, petitioners filed a petition for writ of mandate in the Supreme Court of California asking for an expedited hearing and decision of all state law issues in view of the time exigencies caused by the approaching 1984 congressional election deadlines. Although this is a common procedure by which other California redistricting cases have been resolved in the past, the California Supreme Court nonetheless denied the petition on October 27, 1983, without a hearing and, ostensibly, without prejudice to petitioners' seeking relief in an appropriate state court when "the abstention order becomes final." (Pp. 25a-26a, *infra.*)

In light of the California Supreme Court's refusal to act, the failure of the Democratic congressional delegation to prosecute its action in the Superior Court in Los Angeles, and the approaching 1984 election cycle, petitioners, in December 1983, asked the district court to lift its abstention order and reassert jurisdiction. At the same time, they moved for leave to file a second amended complaint. In the second amended complaint, petitioners deleted all pendent state law claims. They objected to A.B. 2X solely on federal constitutional grounds: that the redistricting statute constituted a political gerrymander and thereby violated several of petitioners' constitutional rights—their rights under Article I, Section 2, to play a proper role in the election of their representatives; their rights, under the Fourteenth Amendment, to the equal

protection of the laws; and their rights, under the First Amendment, to associate with others of their political persuasion to advance their political cause.

District Judge Schnacke granted petitioners' motion to file the second amended complaint omitting the pendent state law claims, and thereafter answers to the second amended complaint were filed. The three-judge court scheduled a hearing for April 13, 1984, on all pending motions.

After oral argument, however, the district court denied petitioners' request to lift the abstention. The opinion was written by Circuit Judge Poole, and joined by District Judge Zirpoli (pp. 4a-15a, *infra*), with District Judge Schnacke dissenting (pp. 16a-20a, *infra*). This ruling came more than six months after the motion to reassert jurisdiction was filed, and more than 15 months after petitioners filed their original complaint, precluding any relief for the 1984 congressional elections.

The court was not moved by petitioners' unsuccessful effort to invoke the processes of the California Supreme Court or by their subsequent dropping of the pendent state law claims. It remitted them, effectively, to the glacial processes of the Los Angeles County Superior Court to pursue there, in a lawsuit of others' devising and in a forum of others' selection, claims that petitioners, in their second amended complaint, had manifested their willingness to forgo. In his dissent, Judge Schnacke protested what he termed "a misapplication of the doctrine of abstention" and said that further abstention "poses grave danger to the constitutionally protected right to vote and to have each person's vote be given equal weight." (Pp. 16a-17a, *infra.*)

On a second appeal and precautionary petition for mandamus, the court of appeals, while professing a con-

tinuing "concern about federal voting rights and the need for a timely resolution of this case" (p. 3a, *infra*), sustained the district court's continued abstention because it did not think that petitioners had made an adequate showing that they had effectively pursued their remedies in state court (p. 2a, *infra*).[6]

REASONS FOR GRANTING THE WRIT

Certiorari should issue in this case because the refusal of the courts below to adjudicate substantial claims of impairment of the constitutionally assured right to vote rests on a mistaken application of the principles by which this Court has defined those rare occasions where abstention is permitted; because of the contrast between the decision below and the course followed by another three-judge court in recently deciding the merits of a substantially similar gerrymandering claim in Indiana; because the decision below conflicts with decisions of the Second and Seventh Circuits holding that abstention ought not to continue if the state judiciary declines an opportunity to provide an expeditious adjudication of issues that first prompted an order of abstention; because the decision below effectively precludes petitioners from securing relief for at least one more and perhaps even further congressional election cycles; and because the refusal of the California Supreme Court to apply its usual expeditious procedures for resolving redistricting cases renders unacceptable any further insistence that an initial adjudication be secured from the state judiciary.

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[6] Notwithstanding petitioners' belief that the court of appeals erred in remitting them again to the state courts, on January 18, 1985, petitioners moved for precedence and to advance in the Los Angeles Superior Court action. Petitioners have simultaneously filed this petition with this Court so that some resolution of their claim can be ensured in time for the 1986 or 1988 congressional elections.

I. A TWO-YEAR ABSTENTION FROM DECIDING THE IMPORTANT VOTING RIGHTS ISSUE OF POLITICAL GERRYMANDERING IS CONTRARY TO THE DECISIONS OF THIS COURT

The drafters of the current California congressional districts deliberately constructed a sophisticated and invidious gerrymander of historic proportions, effectively diluting Republican votes in congressional elections throughout the nation's most populous state. The Democratic-controlled legislature used modern computer techniques that make it easy to create equally populous districts without regard to existing political lines or the shape or contiguity of the districts, but with regard to the political affiliations of residents of those districts. This prompted one commentator to suggest that Elbridge Gerry, the governor of Massachusetts who gave his name to the gerrymander, would have to give way to the principal architect of the California creation, who "has made a strong bid to have the entire practice renamed in his honor." [7]

The California gerrymander is unmistakable in its appearance and its effect. Many of the districts created by this statute are "strangely irregular" and "uncouth" in their configuration, *Gomillion* v. *Lightfoot*, 364 U.S. 339, 341, 340 (1964). *See* maps that are included in the Appendix to this petition (pp. 46a-50a, *infra*).[8] The creation of such districts has had the intended effect of ensuring the election of Democrats as is demonstrated by the results of last year's California congressional elections. Democrats were elected to 27 of California's 45 seats—*60% of the seats*—even though Republican congressional candidates *actually received more votes than Democratic candidates* (49.3% Republican to 48.4% Dem-

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[7] *Congressional Quarterly: State Politics and Redistricting*, 145 (1982).

[8] Detailed color maps of the entire plan have been filed with the Clerk of this Court.

ocrat). The gerrymander virtually assures that incumbents will retain their seats through the end of this decade, as is reflected in the overwhelming margins of victory in the 1984 elections. Competitive congressional races have virtually disappeared in California. The 1984 California congressional election results are set out in the Appendix to this petition (p. 52a, *infra*).[9]

The elections that resulted in the highly disproportionate return of Democrats to office were held without the legality of the legislature's second gerrymander having been tested for its constitutionality. The reason is the decision of the district court, affirmed by the court of appeals, that it would abstain from adjudicating petitioners' substantial claim that the gerrymander violated their federal constitutional rights until subsidiary state law issues were heard and decided by a state court.

Petitioners have attempted unsuccessfully to invoke the processes of the highest court of the state to obtain a prompt ruling on the state claims, and, in the wake of the California Supreme Court's declination to act, they have dropped their state claims from the federal court suit. Nonetheless, the district court, sustained by the court of appeals, has continued its abstention, effectively telling petitioners that they must try harder to get a state adjudication. The continued abstention ensures that the congressional elections of 1986 and perhaps even those of 1988, will be held without the gerrymander of the congressional district ever having been tested for its constitutionality.

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[9] This issue is not a limited, state law question affecting California alone, but rather, one that could affect the makeup of the *entire* House of Representatives. Using nearly complete unofficial tabulations, one commentator pointed out that Democratic congressional candidates received 36,615,220 votes in 1984, only slightly more than the Republican vote of 36,576,336. Yet "out of a popular vote margin of a few thousand votes, the Democrats have managed to manufacture a 71-vote majority in the House." Editorial, *The National Gerrymander*, Wall St. J., Nov. 26, 1984, at 2, col. 1.

In its first substantive congressional redistricting case, this Court enunciated the fundamental status of the right to vote. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory, if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). The right to vote, accordingly, is "fundamental because [it is] preservative of all rights," *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965), quoting *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). In this case, delay in the vindication of the fundamental right to vote is the denial of that right. The delays tolerated by the courts below "strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964).

The mere prospect of delay of adjudication of fundamental rights is sufficient to make abstention improper, even when state law may be unclear or when state court resolution could avoid adjudication of a federal issue. In *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), the district court had abstained from deciding a vagueness challenge to a state statute that impinged on First Amendment freedom. This Court reversed, refusing to:

> . . . ignore that abstention operates to require piecemeal adjudication in many courts, . . . thereby delaying ultimate adjudication on the merits for an undue length of time, . . . a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms . . .

Id. at 378-79. See also *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967). The Court noted that the proceedings in *Baggett* v. *Bullit* had been pending for two years while the statute under challenge remained in force. Petitioners also have been delayed for two years, yet their fundamental voting rights go unprotected.

In another voting rights case, this Court sustained a district court's refusal to abstain from adjudicating the constitutionality of a state statute requiring payment of a poll tax or a six months advance registration as alternate requisites to voting. *Harman* v. *Forssenius*, 380 U.S. 528 (1965):

> In appraising the motion to stay proceedings, *the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens.* The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. *Given the importance and the immediacy of the problem and of the delay inherent in referring questions of state law to state tribunals*, it is evident that the District Court did not abuse its discretion in refusing to abstain.

Id. at 537 (emphasis added). If petitioners here, also a broad class of citizens who have had their rights to vote impaired, are correct about the unconstitutionality of the California gerrymander, they have already been made to suffer dilution of their proper voting strength in the 1984 elections and, with no end of the abstention in sight or promised, the 1986 elections (with the long lead time they necessarily entail) loom near.

Griffin v. *School Board*, 377 U.S. 218 (1964), held that it was error to apply the *Pullman* analysis when constitutional rights were being impaired and delay aggravated the impairment. Adopting this Court's approach, another court of appeals has aptly said, "The delay inherent in abstention takes a particularly heavy toll when a voting rights challenge raises doubts in the public mind about the legitimacy of officeholders and the governmental bodies on which they serve." *Duncan* v. *Poythress*, 657 F.2d 691, 699 (5th Cir. 1981).

The misapplication of the abstention doctrine to delay and thereby to deny petitioners the vindication of their

voting rights is inconsistent with decisions of this Court. This Court has emphasized (1) that, in any kind of case where a substantial challenge based on federal law is made to a state enactment, abstention is the exception, not the rule, an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it and (2) that redistricting and other voting rights cases, where the passage of time without a remedy has peculiarly severe consequences, are special and thus call for narrowing even further the narrow exception that is the abstention doctrine. Other federal courts have accepted the lesson of this Court's reapportionment cases. Federal courts are the proper forum for their adjudication and abstention plays little, if any, role. In no other congressional redistricting case of which the petitioners are aware has a federal court abdicated its duty to decide substantial federal claims pending the disposition of state claims.

II. ABSTENTION IS IMPROPER AS FEDERAL LAW CONTROLS CONGRESSIONAL REDISTRICTING CASES

Federal law, not state policy, sets the standard for reviewing congressional redistricting cases. *Wesberry* v. *Sanders*, 876 U.S. 1 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Karcher v. Daggett*, 103 S.Ct. 2653 (1983). This Court has refused to allow federal constitutional standards to be diluted by state concerns. If the applicable federal standard is not met, it is immaterial whether the statute is legal as a matter of state law. *McNeese* v. *Board of Education*, 373 U.S. 668, 674 (1963).

In contrast to the courts below, the three-judge district court in *Bandemer* v. *Davis*, *supra*, which is on appeal to this Court, applied these lessons well. That case was brought by Democratic Party plaintiffs in Indiana *claiming both state and federal* constitutional violations. That court, without a word about abstention, allowed the state

claims to be pleaded, briefed, and argued astride the federal constitutional claims. When it found that the political gerrymandering against the Indiana Democrats was so egregious as to violate the federal guarantee of equal protection of the laws, the court simply disregarded the pendent state constitutional claims as unnecessary to its decision. That sensible manner of proceeding accords with what all the other federal courts, except the courts below, have done in congressional redistricting cases.

Every federal court that considered congressional redistricting following the 1980 decennial census, adjudicated the federal claims despite the presence of pendent state law claims in some of the same lawsuits.[10] *See, especially, Ryan* v. *State Board of Elections of Illinois*, 661 F.2d 1130 (7th Cir. 1981), where the parties raised only federal constitutional and statutory claims against Illinois' congressional redistricting before the federal district court. The Court of Appeals for the Seventh Circuit held that the district court "had no authority to abstain." *Id.* at 1135. With the deletion of state law claims from the second amended complaint, the petitioners' case is not different from that in *Ryan*. The *Ryan* court noted that where the parties, as do petitioners here, "assert *only* federal constitutional and statutory claims . . . . [a] state court could not render these claims moot by deciding the case on state grounds because no such grounds exist." *Id.* at 1136. (Emphasis in original). Moreover, three-judge federal panels were the forum for virtually every other

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[10] *See Flateau* v. *Anderson*, 537 F.Supp. 257 (S.D.N.Y. 1982); *In re Pennsylvania Congressional Districts Reapportionment Cases*, 535 F.Supp. 191, 567 F.Supp. 1507 (E.D. Penn. 1982) (included pendent state law claim regarding compactness and contiguity requirements); *Carstens* v. *Lamm*, 543 F.Supp. 68 (D. Colo. 1982) (included pendent state law claim regarding compactness and contiguity requirements); *Major* v. *Treen*, 574 F.Supp. 325 (E.D. La. 1983); *In re Illinois Congressional Districts Reapportionment Cases*, —— F.Supp. —— (N.D. Ill. 1982), *aff'd sub nom. Ryan* v. *Otto*, 454 U.S. 1130 (1982).

congressional redistricting case following the 1980 decennial census.[11]

The district court decision in *Bandemer* v. *Davis* is pertinent to this case in another way. It is fair to infer that the decisions of the courts below to abstain from adjudicating petitioners' claims are motivated in part, at least, by the perceived uncertainty regarding the justiciability of the underlying gerrymandering issue. (*See* p. 10a, *infra*, footnote 5.) Even if this were a basis for abstention, *Bandemer* v. *Davis* demonstrates the substantiality of the issue and the lower courts' error in this regard. This Court recognized in the seminal reapportionment case of *Reynolds* v. *Sims* that "history has been a continuing expansion of the scope of the right to suffrage in this country." 377 U.S 533, 555 (1963).[12]

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[11] *Goddard* v. *Babbitt*, 536 F.Supp. 538 (D. Ariz. 1982); *Dublin* v. *White*, 528 F.Supp. 1323 (E.D. Ark. 1982); *Clem* v. *Haben*, —— F.Supp. —— (N.D. Fla. 1982), Case No. TCA 82-0933; *Busbee* v. *Smith*, 549 F.Supp. 494 (D.D.C. 1982) (Georgia); *Travis* v. *King*, 552 F.Supp. 554 (D. Hawaii 1982); *O'Sullivan* v. *Brier*, 540 F.Supp. 1200 (D. Kan. 1982); *LaComb* v. *Growe*, 541 F.Supp. 145, 541 F.Supp. 160 (D.Minn. 1982); *aff'd mem. sub nom. Orwoll* v. *LaComb*, 456 U.S. 966 (1982); *Jordan* v. *Winter*, 541 F.Supp. 1135 (N.D. Miss. 1982); *Shayer* v. *Kirkpatrick*, 541 F.Supp. 922 (W.D. Mo. 1982), aff'd, *Schatzle* v. *Kirkpatrick*, 456 U.S. 966 (1982); *Daggett* v. *Kimmelman*, 535 F.Supp. 978 (D. N.J. 1982), *aff'd on appeal sub. nom. Karcher* v. *Daggett*, —— U.S. ——, 106 S.Ct. 2653 (1983); *Flanagan* v. *Gillmor*, —— F.Supp. —— (S.D. Ohio 1982); *South Carolina State Conference of Branches of the NAACP* v. *Riley*, 533 F.Supp. 1178 (D.S.C. 1982), *appeal dismissed*, 459 U.S. 1026 (1982); *Seamon* v. *Upham*, 936 F.Supp. 931 (E.D. Tex. 1982), *vacated per curiam*, 456 U.S. 37 (1982); (*Doph* v. *Munro*, —— F.Supp. —— (W.D. Wash. 1982); *State AFL-CIO* v. *Elections Board*, 543 F.Supp. 630 (E.D. Wis. 1982).

[12] This historical development, and its relationship to political gerrymandering, is discussed at length in: Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket*, 1 J.L. & Pol. 357 (1984).

In *Bandemer*, which concerned the redistricting of the Indiana legislature, the district court found that "political gerrymandering did occur and the [Democratic Party] plaintiffs were disadvantaged thereby." *Id.* at 24. The court found that partisan considerations motivated the Republican-controlled Indiana legislature in constructing state legislative districts, and that the resulting district lines had a significantly adverse impact upon Democratic voters. The court concluded that the plan was invalid as a denial of fair and effective representation and, thus, of the equal protection of the laws. *Id.* at 24-25.

In finding a violation of the Fourteenth Amendment, the *Bandemer* district court was persuaded by this Court's rejection of New Jersey's 1981 congressional redistricting in *Karcher* v. *Daggett*, *supra*, because of the many similarities between the facts in the New Jersey and Indiana redistrictings, and by the analyses of political gerrymandering in Justice Stevens' concurrence and Justice Powell's dissent in *Karcher*. Petitioners are informed by the Clerk of the United States District Court for the Southern District of Indiana that the *Bandemer* defendants filed a notice of appeal to this Court on January 11, 1985.

Because this case concerns congressional districts, there is even less reason to defer to state authorities, and an even broader constitutional base for a decision that the gerrymander is invalid: Article I, Section 2, of the United States Constitution as well as the First and Fourteenth Amendments.

III. CONTINUING ABSTENTION AFTER THE CALIFORNIA SUPREME COURT REFUSED TO HEAR THE CASE CONFLICTS WITH DECISIONS IN OTHER CIRCUITS

The court of appeals stated quite pointedly that it did "not necessarily agree with the reasons stated by the district court in support" of its decision that abstention should continue and apparently rested its decision affirm-

ing the district court solely on the ground that it was "not satisfied that the Republicans have effectively pursued their claim in state court." (P. 2a, *infra.*) If petitioners are right that they should never have been remitted to their state court remedies in this voting rights case, the court of appeals' rationale is plainly insufficient to justify further abstention.

Even if petitioners had some duty to repair to state courts, that duty has been discharged. In asking the Supreme Court of California for a writ of mandate, petitioners pursued their claim in exactly the way that has been the accepted procedural route in California redistricting cases.

The Supreme Court of California has jurisdiction of original writs of mandate and has regularly, and without exception for more than 20 years, exercised that jurisdiction in statewide reapportionment cases to render speedy and final decisions. *See e.g. Assembly* v. *Deukmejian*, 30 Cal.3d 638 (1982) (establishment of districts for 1982 election); *Legislature* v. *Reinecke*, 10 Cal.3d 396 (1973) (establishment of districts for 1974-80 elections); *Legislature* v. *Reinecke*, 6 Cal.3d 595 (1972) (establishment of districts for 1972 election); *see also Silver* v. *Brown*, 63 Cal.2d 316 & 841 (1965). In such cases, the California Supreme Court has made its rulings with extraordinary speed. *See e.g. Legislature* v. *Reinecke*, 6 Cal.3d 595 (34 days from filing of petition); *Assembly* v. *Deukmejian*, 30 Cal.3d 638 (70 days from filing of petition); *see also Wenke* v. *Hitchcock*, 6 Cal.3d 746, 750-51 (1972); *Brown* v. *Superior Court*, 5 Cal.3d 509, 514-15 (1971); *Farley* v. *Healey*, 67 Cal.2d 325, 326-27 (1967).

Even though the California Supreme Court has an extensive record of providing speedy and final judgment in other redistricting cases presented to it by original writ, it refused to do so in this case. That court itself has said that: "In *Pullman*-type cases, the federal court retains

jurisdiction so that it may either apply the resolved state law, or resolve the state question itself if the state courts refuse to do so for any reason." *National Audubon Society* v. *Superior Court*, 33 Cal.3d 419, 431, n.12 (1983).

Petitioners filed their petition for a writ of mandate in the California Supreme Court on September 30, 1983, within four days of the court of appeals' first decision sustaining the district court's abstention. They expected that the California Supreme Court would assume jurisdiction and resolve the matter finally and in a timely way. No such prompt and definitive resolution of the claims could be had in the pending Los Angeles County Superior Court action (or in any other hypothetical state court proceeding of the kind to which the court of appeals vaguely referred in its second opinion [p. 2a, *infra*]).

On October 27, the California Supreme Court denied the petition without hearing and, thus, even though it ostensibly invited further action in an appropriate state court, denied petitioner the possibility of any timely relief from a state court. The first of the procedural deadlines for congressional elections falls in December of the preceding year, according to the Secretary of State.

Petitioners were thus first ordered by the federal courts to seek initial relief in the California state courts, and were then refused even a hearing on their claims by a court that had an extensive history of hearing such cases. The record below indicates that, except in unusual cases, state court litigation that is prosecuted diligently takes as long as four or five years before resolution by the state Supreme Court. The decision of the California Supreme Court to decline to hear the case thus left two courses open to the petitioners: (1) to pursue litigation in the most congested trial court in the state—litigation unlikely to complete its journey through the state's judicial system before the 1988 elections; or (2) to request the three-judge district court to lift its order of abstension. Petitioners promptly followed the latter course upon

learning that they had been excluded from the State Supreme Court's docket.

The outer bounds of deference to state court proceedings in apportionment cases were defined in *Scott* v. *Germano*, 381 U.S. 407 (1965). There, the question posed was whether a district court should abstain pending the completion of the work of the state legislative and judicial authorities on the apportionment of the Illinois Senate. In holding, on June 1, 1965, that the district court should stay its hand, this Court also instructed the district court to "enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court," should complete their redistricting task so that "the same be accomplished within ample time to permit such plan to be utilized in the 1966 election. . . ." 381 U.S. at 409. The lower federal courts in this action may perhaps have followed a comparable course to the extent they granted the California judicial system an opportunity to adjudicate petitioners' charges before the 1984 election. Once the California Supreme Court refused to provide prompt relief, all basis for abstention had ended and the three-judge court should have proceeded promptly to adjudicate the matter and to do so before another election was held.

Two courts of appeals have explicitly recognized that abstention orders must end when the state judiciary has received and has declined an opportunity to resolve expeditiously issues that prompted an order of abstention. *Lister* v. *Lucey*, 575 F.2d 1325 (7th Cir. 1978), considered a decision by which a district court had refused to lift an abstention order, even after a state court had refused to resolve the state law issue involved, telling the plaintiffs that a petition to the state legislature must go before action in the state courts.

The Seventh Circuit rightly found that the district court's continued insistence on abstention was error:

> The first reason why waiting for additional state proceedings was inappropriate is that it is inconsistent with the general concern of federal courts about the delay inherent in a decision to abstain . . . and the related concern about the burdensomeness of resort to more than one decision-making process. Cf. *Baggett* v. *Bullitt*, 377 U.S. 360, . . . Clearly the steps that the district court impliedly required of the plaintiffs here are not the "easy and ample means" available in *Pullman*, 312 U.S. 496, 501, 61 S.Ct. 643, 85 L.Ed. 971, when the doctrine of abstention was conceived. *Id.* at 1331.

In *414 Theater Corp.* v. *Murphy*, 499 F.2d 1155 (2d Cir. 1974), the Second Circuit considered the propriety of a district court's termination of an abstention order after a state appellate court had "avoided decision" on the merits of the matter that had initially prompted abstention. The court of appeals sustained the district court's decision that "[the] state courts have had ample opportunity to consider the question . . . and have declined to do so." *Id.* at 1157. The court said:

> Where the state court has deliberately avoided an interpretation of a statute which might save its constitutionality or moot the federal claim, the abstaining federal court may certainly reassert the jurisdiction it was retaining in order to reach the merits. Neither comity nor sound judicial administration require the abstaining federal court to wait indefinitely for state courts to determine the merits. *See NAACP* v. *Gallion*, 368 U.S. 16, 82 S.Ct. 4, 7 L.Ed. 2d 85 (1961). *Id.* at 1157.

These opinions are in direct conflict with the decision below. Like the Seventh Circuit in *Lister*, the Ninth Circuit should have instructed the district court to evaluate and resolve the important federal questions that have been presented to it. The conflict between the decision in this case and the decision in *Lister* (and the analysis in *414 Theater Corp.*) present a matter that is in itself

worthy of plenary consideration under Rule 17(1)(a) of this Court.

Absent such review, millions of California citizens may be denied any meaningful vote in congressional elections for the rest of the decade.[13]

As Judge Schnacke noted in his dissent to the district court's June 19, 1984, decision, "The *Pullman* doctrine sanctions abstention . . . when a federal constitutional issue exists which might be mooted or presented in a different posture by state court construction of applicable state law." (P. 17a, *infra.*) In the current case, however, he wrote:

> [The] state statute at issue has become clear and certain . . . [and] is not susceptible of different constructions. Boundaries of individual congressional districts are clear and distinct. This redistricting scheme has been overtly validated in that it has been implemented in two congressional elections. (P. 17a, *infra.*)

Assessing the pendent claims of procedural infirmities in the enactment of the statute, as "not seminal to plaintiffs' present case," Judge Schnacke correctly pointed out that petitioners' primary grievance is that the gerrymandered statute "works an invidious discrimination against them, depriving them of their constitutionally protected right to vote." *Id.* Furthermore, Judge Schnacke notes that a state court determination of the validity of state claims "will not modify, obviate nor alter a federal claim of invidious political gerrymandering." (P. 18a, *infra.*)

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[13] Computer technology has significantly changed the redistricting process as performed by state legislatures. Absent review by this Court of the issues surrounding partisan gerrymandering, legislatures will have little guidance as to how to perform their redistricting duties. New technology provides very tempting avenues to discriminate against any political minority. In a very real sense, these issues will determine who will decide the membership of the House of Representatives: clever draftsmen, or the American voters.

The many parallels between this case, *Karcher* v. *Daggett, supra,* and *Bandemer* v. *Davis, supra,* are striking, and the underlying federal constitutional issues deserve an opportunity to be heard on the merits. As Judge Schnacke noted, "these parallels demand a full exploration of the merits of [petitioners'] case and that due consideration should be given now." (P. 20a, *infra.*) Inasmuch as this case has been pending for two years, petitioners are not seeking a premature adjudication, but, quite simply, a day in court on the merits of the federal constitutional claim of political gerrymandering.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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January 30, 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2166

D.C. No. C-83-1126-RHS

ROBERT E. BADHAM, *et al.*,
Plaintiffs-Appellants,

—VS—

MARCH FONG EU, Secretary State of the State of California,
Defendant-Appellee,

ASSEMBLY OF THE STATE OF CALIFORNIA, THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,
Intervenors.

No. 84-7441

ROBERT E. BADHAM, *et al.*,
Petitioners,

—VS—

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

MARCH FONG EU, Secretary of State for the State of California, et al.,
Real Parties in Interest.

Appeal from the United States District Court for the Northern District of California

Robert H. Schnacke, District Judge, Presiding

Argued and Submitted September 13, 1984

[Filed Nov. 1, 1984]

Before: DUNIWAY, WALLACE, and PREGERSON, Circuit Judges.

MEMORANDUM

Registered Republican voters in several congressional districts in the State of California (the Republicans) challenge the decision by a majority of the three-judge district court which refused, at this time, to withdraw its order of abstention pending the resolution of California state law issues in the California state courts. We are governed by our earlier decision. 721 F.2d 1170 (9th Cir. 1983). The facts since that decision are outlined in the opinion of the district court.

Once more, we find it unnecessary to determine whether our jurisdiction over this matter is by appeal or by writ of mandamus. *See* 721 F.2d at 1171-72. In either case, we will not overturn the decision of the district court. We do not necessarily agree with the reasons stated by the district court in support of its opinion, but conclude there is an ample record to sustain the district court's decision.

We are not satisfied that the Republicans have effectively pursued their claim in state court. After the abstention order was final, no new petition was filed in the California Supreme Court. In the Superior Court of the State of California in and for the County of Los Angeles, no attempt was made to receive expedited resolution of the issues or to secure equitable relief. There is an insufficient showing by the Republicans that they cannot resolve the state issues in the state court early enough so that, if unsuccessful, they will be able to resolve their federal claims in the federal court in time for any required redistricting prior to the 1986 elections.

We do not interpret the opinion of the district court as limiting the Republicans to action only in the Superior Court of the State of California in and for the County of Los Angeles. They may choose any appropriate state

forum which will dispose of their claim. We, of course, make no decision as to which state forum or forums are appropriate.

The district court is well aware of our concern about federal voting rights and the need for a timely resolution of this case. *See* 721 F.2d at 1173. The district court's requirement of monthly status reports demonstrates a continuing interest in this controversy. Thus, the district court will be sufficiently informed as to any need to dissolve its order of abstention and, if appropriate, to resolve timely the federal voting rights claims.

At oral argument we acted on the motion to strike and to augment the record. All remaining motions are denied as moot.

AFFIRMED.

Note: The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in rule 21(c).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,

Plaintiffs,

vs.

MARCH FONG EU, Secretary of State of the State of California,

Defendant,

ASSEMBLY OF THE STATE OF CALIFORNIA and THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,

Defendant-Intervenors.

[Filed June 19, 1984]

Before: POOLE, Circuit Judge, and ZIRPOLI and SCHNACKE, District Judges

MEMORANDUM OPINION AND ORDER

POOLE, Circuit Judge:

Plaintiffs, registered Republican voters and officeholders, filed this suit on March 8, 1983, challenging the constitutionality of California Congressional Redistricting Assembly Bill 2X (A.B. 2X).

By an amended complaint, plaintiffs alleged that the bill violated the Constitution of the United States and the Constitution and statutes of the State of California. On June 20, 1983, we ordered abstention of rulings on the federal claims, and directed the parties to go to state court (at least one case raising the relevant issues had already been initiated) and attempt to obtain decision on the state law claims because such adjudication might well terminate the controversy altogether or substantially alter any remaining federal claims.

On December 12, 1983, without having obtained state court adjudication of any of the claims, plaintiffs came back to us and filed an application to reassert jurisdiction. They also requested leave to file a Second Amended Complaint purportedly containing only federal claims.

Upon full consideration we have determined that plaintiffs' application will be rejected because plaintiffs have not sought a resolution of the state law claims in good faith; they have not been refused such adjudication by any state court; the case still calls for resolution of the state law claims, if reasonably possible;[1] and because continued abstention does not present any danger to plaintiffs' voting rights which our reassertion of jurisdiction at this time might prevent.

We are convinced that such possibility does still exist.

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[1] The dissent believes that the state law issues are clear and certain and that their resolution by state courts will not "modify, obviate nor alter the federal" claim. Dissent at 3. We disagree. If a state court invalidates A.B.2X on any one of the state law claims, plaintiffs would have no reason to return to federal court. Moreover, if a state court invalidates the Secretary's "technical corrections" thus making the population deviation 3.283%, A.B.2X would be vulnerable to a one person one vote attack under Article I, § 2 of the Constitution. A federal court might therefore be able to avoid the more controversial claim of political gerrymandering.

HISTORY OF THE CASE

A.B.2X was passed by the California Assembly and Senate on December 30, 1982, signed by the Governor on January 2, 1983, and was chaptered. On January 5, 1983, the Secretary of State transmitted the chaptered bill to the Registrars of Voters and County Clerks.

The complaint alleged that A.B.2X violated Article I, § 2 of the Constitution of the United States by establishing districts containing population deviations of 3.283%. Subsequently the Secretary of State of California issued a series of "technical corrections" which, if valid, would reduce the deviations to .0538%.

Plaintiffs then amended the complaint to allege that A.B.2X was still invalid under state and federal law. Specifically, they alleged four violations of the California Constitution [2] and three violations of the federal Constitution.[3]

Plaintiffs moved for partial summary judgment. The Defendant Secretary of State, and the Defendants-Intervenors Assembly of the State of California and the California Democratic Congressional Delegation, moved to dismiss or for abstention.

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[2] (1) In making the technical corrections the Secretary of State violated California Constitution Article III, § 3, and Article XXI § 1 by usurping the legislature's role; (2) that the "three-reading" rule required by California Constitutional Article IV, § 8 had not been followed; (3) the plan violated California Constitution Article II, § 9 by attempting to thwart the manifest intent of the voters when they passed Proposition 10 by which a predecessor redistricting bill had been rejected; and (4) the plan failed to respect city and county units and contained non-contiguous districts, contrary to California Constitution Article XXI.

[3] (1) The plan violated due process and equal protection; (2) the population deviations exceeded constitutional limits, whether of 3.283%, as chaptered, or .0538% as implemented; (3) the plan is a political gerrymander intended to dilute Republican voting strengths.

This court held a plenary hearing on these motions on May 26, 1983. As indicated in the supporting and opposing documents of the respective parties, and argued at the hearing, the parties to the federal action were also parties in contemporary state court proceedings involving the same issues. On April 26, 1983, the California Democratic Congressional Delegation had filed a civil action in the Superior Court of the State of California for the County of Los Angeles seeking a declaration of the validity of A.B.2X. *The Members of the California Congressional Delegation, et al. v. March Fong Eu, et al.*, Los Angeles Superior Court, C-450 827. Named as defendants were the Secretary of State and the Republicans who are plaintiffs before us. The Secretary of State and the intervenors argued that we should withhold federal proceedings because our case was rife with state law issues, the decision of which would either eliminate the need for passing on, or would substantially alter the factual basis of the federal constitutional claims, as those issues were already joined in a state court forum.

After full argument, we took the motions under submission. On June 20, 1983, in a Memorandum of Decision, we ordered abstention on the authority of *Railroad Commission v. Pullman*, 312 U.S. 496 (1941), so that potentially dispositive state law questions could be determined by the California courts. *Badham v. March Fong Eu, Secretary*, 568 F.Supp. 156 (N.D. Cal. 1983) (*Badham I*). We abstained "until the state law issues are settled by the state court," but retained jurisdiction "to resolve" whatever federal issues remain. *Id.* at 161.

Plaintiffs informed the Ninth Circuit that our abstention order completely barred them from returning to federal court until the California courts actually decided the state law issues. We intended no such thing. All that we required was that the plaintiffs make a good faith effort to obtain a state court ruling on the state issues. If, after making this effort, plaintiffs were still without a state

court decision, we would surely reassert our jurisdiction. *See* Transcripts of Proceedings, May 26, 1983, at 117-120.

ACTION FOLLOWING ABSTENTION

These events occurred after we ordered abstention:

(1) On June 28, 1983, the Republican defendants, some of whom are plaintiffs in the federal action, filed demurrers and moved for change of venue in the state superior court action. On August 17, 1983, the superior court granted the demurrer as to the Republican National Committee but denied the demurrers filed by the other Republicans. The court also denied the notice for change of venue. The Republicans did not answer the complaint until September 16, 1983. There has been nothing further.

(2) On June 29, 1983, plaintiffs filed both a timely appeal and later a petition for writ of mandamus to the Court of Appeals for the Ninth Circuit. The case was expedited and oral argument was had on August 10, 1983.

(3) On September 26, 1983, the Court of Appeals issued its opinion affirming the abstention order. It concluded that all the requirements for abstention had been met, "[e]ssentially for the reasons stated by the district court * * *." *Badham v. United States District Court for the Northern District of California*, 721 F.2d 1170, 1172 (9th Cir. 1983) (*Badham II*).

(4) On September 30, 1983, plaintiffs filed with the Supreme Court of California a petition for a writ of mandate which tendered the state law issues mentioned above. *See* Exhibit B to plaintiffs' "Application to Federal District Court to Exercise Jurisdiction," *post*. The petition cited the pendency of the federal and Los Angeles Superior Court actions, describing the issues as "virtually identical." Petitioners urged that "the matter be briefed, argued and decided no later than November 1, 1983."

(5) On October 11, 1983, plaintiffs filed a petition for rehearing with the Ninth Circuit.

(6) On October 27, 1983, the California Supreme Court denied the petition for writ of mandate for three reasons:

> (1) The petition was premature because plaintiffs' petition for rehearing was pending before the Ninth Circuit;
>
> (2) plaintiffs delay between June 10, 1983, and September 30, 1983, in seeking relief in the Supreme Court prevented resolution of the disputed factual claims by the November 1, 1983, date specified by plaintiffs; and
>
> (3) the relief requested was inappropriate since time constraints might well necessitate use of the challenged congressional districts for the 1984 elections.[4]

(7) On December 12, 1983, the Ninth Circuit denied the petition for rehearing.

(8) On the same date, December 12, 1983, plaintiffs returned to this court where they filed their application

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[4] The California Supreme Court order reads:

> The petition for writ of mandate is denied, as premature.
>
> The issues presented are the subject of another action now pending in the United States District Court for the Northern District of California (Badham v. Eu, C-83-1126 RHS) in which that court's abstention order is not final. Petitioners' delay between June 10, 1983, and September 30, 1983, in seeking relief in this court has foreclosed reference for resolution of the disputed factual claims and disposition after briefing, argument, and preparation of an opinion by the November 1, 1983, date specified by petitioners. The relief requested is in any event inappropriate since, regardless of how the state law issues are resolved, time constraints might well necessitate use of the challenged congressional districts for the 1984 primary and general elections. (Assembly v. Deukmejian (1982) 30 Cal. 3rd 638, 660-661.)
>
> The denial of this petition is without prejudice to the filing of a subsequent petition seeking relief in an appropriate court at such time as the abstention order becomes final.

to reassert jurisdiction, and motions for leave to file a Second Amended Complaint and for preliminary injunction.

Plaintiffs contend in their application:

(A) That comity no longer required abstention because the Supreme Court of California had declined to rule on the state law issues.

(B) Further delay would irreparably damage plaintiffs' constitutional right to vote.

(C) Plaintiffs had sought a state court adjudication of state law issues in good faith.

The Proposed Second Amended Complaint omits the prior specific allegations of violations of the California Constitution and statutory provisions. Plaintiffs purport to plead in paragraph 6 that A.B.2X only violates the federal Constitution in that it is a political gerrymander forbidden by Article I, § 2 and the Fourteenth Amendment.[5] Nonetheless, the following 20 paragraphs describe precisely the same conduct of the defendants as was charged in the First Amended Complaint, except that the governing California Constitutional and statutory references do not appear.

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[5] The dissent seems to believe that *Karcher v. Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983) establishes the justiciability of plaintiffs' political gerrymandering claim. This is not so. In *Karcher*, the plurality opinion invalidated the New Jersey plan solely because it violated the one person one vote principle of Article I, § 2 of the Constitution. They expressed no opinion on political gerrymandering. Obviously the plurality was not at all certain that the use of redistricting to favor one political party offended the Constitution. Only two justices, Stevens and Powell, indicated that they believed an equipopulous districting plan might violate the Constitution as a partisan gerrymander. Because the opinions of two justices alone do not constitute the opinion of the Court, *Karcher* does not establish the justiciability of plaintiffs' political gerrymandering claim.

Plaintiffs contend that, having abandoned their state law claims, this court now has before it for decision only purely federal claims. They argue that they have sought and failed to obtain state court adjudication; that there now are tendered only federal issues; and that under these circumstances, neither comity nor deference to principles of federalism justify further abstention.

RULING ON THE APPLICATION TO REASSERT DISTRICT COURT JURISDICTION

The record does not indicate that a formal order was entered on the Application. However, Judge Robert H. Schnacke, to whom the case had originally been assigned before the convening of the three-judge court, granted the motion for leave to file the Second Amended Complaint, and issued further orders supplementary thereto. These orders by a single judge were, of course, at all times subject to reconsideration by the full court. *See* 28 U.S.C. § 2284(b)(3).

The full three-judge court reconvened on April 13, 1984, for the purpose of considering whether abstention should be terminated and jurisdiction reasserted.

Having heard arguments of the parties and considered their submissions, we conclude that the abstention order shall remain in effect and the parties are directed to resolve the state court issues as indicated in our original order.

GOOD FAITH

Our analysis begins with the Ninth Circuit's admonition that,

> Clearly, the district court's permission for the parties to return to federal court if necessary is predicated on a *good faith effort* to obtain a disposition of the state law issues in state court.

721 F.2d at 1174 (emphasis added).

Plaintiffs contend that they have acted in good faith because they petitioned the California Supreme Court for a writ of mandate on September 30, 1983, four days after the Ninth Circuit affirmed our abstention order. Once the Supreme Court denied the petition, plaintiffs claim that abstention was no longer necessary.

We disagree. Plaintiffs' good faith claim fails on three grounds. First, the Ninth Circuit intended that the good faith effort should begin to run at the time of the abstention order, June 20, 1983, not at the time its opinion issued, September 26, 1983.

> Thus, if the Republicans later seek to obtain a ruling by the district court prior to action by the state courts, the district court must examine any allegations that the Republicans have not acted in good faith, *especially during the time period following its abstention order.*

721 F.2d at 1174 (emphasis added). Between June 20, 1983, and September 30, 1983, plaintiffs made no attempt to present the state law issues to the state courts. Indeed, they actively resisted adjudication in the superior court. This delay was one of the reasons cited by the California Supreme Court for its denial of plaintiffs' petition. *See* Note 3. This three month delay does not constitute good faith.

Second, plaintiffs have mischaracterized the California Supreme Court's denial of their petition for a writ of mandate. Plaintiffs imply that the Supreme Court has completely refused to rule on the state law issues thus depriving plaintiffs of a state forum. This is not so. The Court explicity denied the petition "without prejudice to the filing of a subsequent petition seeking relief in an appropriate court at such time as the abstention order becomes final." The Court did not intend to close off the California courts as plaintiffs would have us believe. The state courts are open and now that the abstention order

is final there is no reason why plaintiffs cannot seek a prompt and final resolution of the state law issues in the "appropriate" state court.

Plaintiffs reliance on *Lister v. Lucy*, 575 F.2d 1325 (7th Cir. 1978) *cert. denied* 439 U.S. 865 (1978) and *414 Theatre Corp v. Murphy*, 499 F.2d 1155 (2d Cir. 1974) is misplaced because in both those cases an action was initiated in the state trial court and on appeal the state appellate court refused to rule on the issues that prompted the federal court to abstain. Here, plaintiffs never brought an action in the state trial courts. Instead they petitioned the California Supreme Court for extraordinary relief and gave that Court only 30 days in which to resolve complicated issues of state law. The Court's denial of the petition is understandable and expressly keeps the state courts open to the plaintiffs in contrast to *Lister* and *414 Theatre Corp.*

Third, the action pending in the Los Angeles Superior Court is very much alive. Plaintiffs contend that that court is not an adequate forum because defendants are intent on delaying the proceedings. This contention is without merit. The Congressional Delegation filed the state court complaint on April 26, 1983. Plaintiffs, who are defendants in the state court, actively delayed the action by filing demurrers and a motion for change of venue. They did not answer until September 16, 1983. Since then they have rested.

Plaintiffs mistakenly believe that the entire burden for expediting the state court action falls on the democrats. A cursory glance at California law indicates that either party can commence discovery, *see* Code of Civil Procedure § 2016(a), file an at-issue memorandum, Rule 206 of the California Rules of Court, or move for summary judgment. Code of Civil Procedure § 437(c). As the parties seeking relief from A.B.2X, palintiffs have at least equal responsibility for expediting the state proceed-

ings. They therefore share the blame for the delay in the superior court.

Therefore, we hold that plaintiffs have not made a good faith effort to obtain a disposition of the state law issues in state court. The California Supreme Court has invited plaintiffs to seek relief in the "appropriate" state court and the action in Los Angeles Superior Court provides plaintiffs with a sufficient opportunity to obtain a ruling on the state law issues.

DELETION OF STATE CLAIMS

Plaintiffs also argue that abstention is no longer required because their proposed Second Amended Complaint omits all of the state law issues. This argument is without merit. Abstention is not based on the parties' artful pleading. It rests on the much loftier considerations of comity and sound judicial administration. It is these considerations and not the pleadings that form the basis for abstention. *Askew v. Hargrave*, 401 U.S. 476, 478 (1971); *Santa Fe Land Imp. Co. v. City of Chula Vista*, 596 F.2d 838, 840 (9th Cir. 1979) ("Appellants cannot be allowed to frustrate the policies underlying the doctrine of abstention by this simple expedient [of not raising state claims in their complaint].").

CONCLUSION

The motion to vacate the abstention order is denied. All of the other motions filed by the parties are also denied.

At the April 13, 1984, hearing before us, plaintiffs have conceded that even when they filed their December application, it was already too late to formulate a new plan for the 1984 Congressional elections. All parties have agreed that relief, if any, could be effective only for the 1986 elections. We are aware that issues of such fundamental importance ought to be resolved with as

great dispatch as reasonably possible, but we are not inclined to accept frustration of a clearly sensible and valid order of abstention merely because no truly good faith effort to comply therewith has been pursued.

To ensure that the state proceedings will not be unnecessarily delayed, the parties are directed to file monthly progress reports with this court. These reports, which may be filed separately or jointly, shall identify all action that has taken place in the state courts. The first report shall be filed thirty days after this decision is filed.

Also, at stated times the full court may schedule status conferences in order that the parties may speak directly of their progress in state court.

Dated: June 18, 1984

/s/ Cecil F. Poole
CECIL F. POOLE
United States Circuit Judge

I concur.

/s/ Alfonso J. Zirpoli
ALFONSO J. ZIRPOLI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,
Plaintiffs,

vs.

MARCH FONG EU, Secretary of State of the State of California,
Defendant,

ASSEMBLY OF THE STATE OF CALIFORNIA and THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,
Defendant-Intervenors.

[Filed June 19, 1984]

DISSENTING OPINION

I respectfully dissent from the majority's view that further abstention is required. This case in its present posture, presents a matter of federal constitutional law of first impression. Its resolution should not be delayed by a misapplication of the doctrine of abstention. The majority ultimately bases its decision on a finding of bad faith on plaintiffs' part. I find no such instances grave enough to justify the inherently harmful delays of abstention. To further abstain poses grave danger to the

constitutionally protected right to vote and to have each person's vote be given equal weight. I would have the three-judge panel exercise jurisdiction so that we may fully explore the merits of plaintiffs' case.

The *Pullman* doctrine sanctions abstention: (1) when a federal constitutional issue exists which might be mooted or presented in a different posture by state court construction of applicable state law; or (2) when difficult questions of state law exist which bear on policy problems of substantial public import, i.e., comity concerns [*Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976)].

Under the first category, abdication of the obligation to decide cases is justified only where the issue of state law is uncertain [*Harman v. Forsennius*, 380 U.S. 528, 534 (1965)].

The availability in the California courts of declaratory relief is wholly beside the point. It is our duty, as part of the federal judiciary, to give due respect to plaintiffs' choice of this federal forum for the hearing and decision of the federal claim of political gerrymandering. Since the state statute at issue has become clear and certain, we need not reach the question of whether state court resolution of state issues will obviate or substantially modify the federal claim [*Wynn v. Carey*, 582 F.2d 1375, 1380 (7th Cir. 1978)]. A.B. 2X is not susceptible of different constructions. Boundaries of individual congressional districts are clear and distinct. This redistricting scheme has been overtly validated in that it has been implemented in two congressional elections.

The issues of the legislative methods and procedures used in the passage of A.B. 2X are not seminal to plaintiffs' present case. Plaintiffs' grievance is that A.B. 2X works an invidious discrimination against them, thereby depriving them of their constitutionally protected right to vote. To cause plaintiffs to repair to state court to decide collateral issues of procedural defects is an abusive

application of the doctrine. Moreover, a state court determination of validity of the Secretary of State's administrative corrections, changing district population deviations from 3% to under 1%, will not modify, obviate nor alter a federal claim of invidious political discrimination. This claim for relief survives a state court decision because the federal claim is wholly insensitive to equapopulous districts. The lack of uncertainty of A.B. 2X along with the lack of any potential for modification of the federal claim, seem to mandate non-abstention.

In addition, the majority ignores the equitable concerns in which the doctrine of abstention is rooted. Abstention is the exception, not the rule, and is appropriate only where repair to state court does not impose harmful delays [*Vickers v. Trainor*, 546 F.2d 739, 745 (7th Cir. 1976) citing *Bellotti v. Baird*,, 428 U.S. 132, 143 (1976)]. Here the delay occasioned by our first abstention order has denied plaintiffs any opportunity for relief in time for the 1984 elections. I believe that further abstention will jeopardize our ability to award any potential relief in time for the 1986 elections. The majority asserts there is sufficient time for resolution of all issues prior to the 1986 elections. The 1986 district lines must be in place prior to December 1985, leaving approximately one-and-one-half years for the parties to work through the overcrowded Los Angeles Superior Court trial calendar, then through the state appellate process and then to return to us for resolution of the federal issue. I believe the majority's confidence in our state and federal judiciaries' ability to move with such dispatch is unrealistic.

My colleagues have reached to find bad faith on plaintiffs' part and use this tenuous finding to overcome the equitable concerns of potential irreparable harm to plaintiffs' voting rights caused by the resultant delay. I disagree.

The Republicans' concern over the inappropriateness of the Los Angeles Superior Court action as the proper

forum for resolution is meritorious. Defendants are the moving party in that action and it is to their tactical advantage to proceed at a leisurely pace. Delays and postponements result in the continuing use of congressional districts drawn and passed by an allegedly partisan vote.

I also fail to find fault in plaintiffs' filing a demurrer as their first responsive pleading. Its partial success speaks of its own merit. The majority labels it a stalling device; but any delay in the State Court proceedigs works to the serious disadvantage of those who wish to have district lines redrawn in time for the next congressional elections.

Under the second category of abstention cases, abstention is inappropriate if there are no overriding comity concerns with the California courts. Here the state issues have been tendered to the highest state court. The California Supreme Court's denial of plaintiffs' request for extraordinary relief makes it clear that that court thought the prompt resolution of the state issues not sufficiently important to justify use of its inherent authority to decide those issues. The California Supreme Court has had the matter before it; it has decided not to act on the present posture of the case; this is sufficient to overcome any comity consideration and justifies the reassertion of federal jurisdiction [*Lister v. Lucey*, 575 F.2d 1325, 1332 (7th Cir. 1978), *414 Theatre Corp. v. Murphy*, 499 F.2d 1155, 1157 (2d Cir. 1974)]. The majority distinguishes these cases because, they say, all state avenues were closed in those cases and the only avenue of relief available was reassertion of federal jurisdiction. That, in a practical sense, is the situation here, by reason of the constraints of time. But, more importantly, neither of those cases was decided on the lack of availability of a state forum for resolution. The issue was whether the state courts had had an *opportunity* to decide the claims; and, finding there had been such an opportunity, it was held that deference had been given and comity concerns satisfied.

Federal courts are not available for relief only when plaintiffs come up against an impasse in state court. The majority itself acknowledges this interpretation in that, in our previous abstention order, it was unanimously agreed that plaintiffs need not wait until a final state court adjudication to return to the court. There are no comity concerns in the instant case and abstention is inappropriate on this alternate ground.

This court should not abdicate its responsibility to decide a difficult federal constitutional issue of first impression. We are not without guidance on how to proceed with a claim that political gerrymandering violates the Fourteenth Amendment. Subsequent to the initial filing of plaintiffs' case, the United States Supreme Court handed down its decision in *Karcher v. Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983) wherein the court discussed the issue of political gerrymandering. Justice Stevens' concurrence sets out objective guidelines for the review of such a claim. There are striking parallels between the New Jersey redistricting scheme declared unconstitutional and the California redistricting plan at issue in this case. This is not to suggest a premature decision as to the constitutionality of A.B. 2X, but rather that these parallels demand a full exploration of the merits of plaintiffs' case and that due consideration should be given now. Plaintiffs' request for the exercise of our jurisdiction should be granted.

Dated: June 6, 1984

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7487

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,
Plaintiffs-Appellants,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
Defendant-Appellee.

[Filed July 26, 1983]

ORDER

The application of plaintiffs-appellants for expedition of the appeal is hereby granted. The appeal will be heard by this court on Wednesday, August 10, 1983, at 3:00 p.m. in Courtroom #2 in the United States Court of Appeals and Post Office Building in San Francisco, along with the hearing of the petition for a writ of mandate, which is now scheduled to be heard at the same time and place, in the case of *Badham, et al. v. United States District Court*, No. 83-7487.

The parties are requested to file, within ten days from the filing of this order, simultaneous supplemental briefs dealing with the following questions:

1. Whether the order from which the appeal is taken is an appealable order.

2. Whether this case, as well as the petition for a writ of mandate, will be rendered moot if the people of the state of California adopt the initiative measure to redistrict the congressional districts in the state of California that is to be on the ballot and to be voted on by the people of California in December of 1983.

3. Whether the fact that the initiative measure is to be voted on in December is a reason for further abstention by this court or the district court.

The appeal will be heard upon the briefs and other papers filed by the parties in case No. 83-7487, which will be deemed the record on appeal in this case, and the two cases will be argued together, each side being allowed a total of one-half hour.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7487

D.C. No. CV 83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S., *Petitioners*,

—vs—

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Respondent*,

and

MARCH FONG EU, Secretary of State of the State of California, *Real Party in Interest.*

[Filed Dec. 12, 1983]

Appeal from the United States District Court for the Northern District of California

ORDER

Before: DUNIWAY, WALLACE, and PREGERSON, Circuit Judges.

The petition for rehearing is denied. In stating that the district court had provided for the Republicans to "return to the federal court if they were unable to obtain a sufficiently swift adjudication of state claims in state

court," *Badham v. United States District Court*, No. 83-7487, slip op. at 4732 (9th Cir. Sept. 26, 1983), we relied on representations to that effect made by one of the parties' counsel as an officer of this court. The following colloquy occurred at oral argument:

> *Counsel for the Secretary of State of California*—"The district court did indicate to all parties that if the state court proceedings were not proceeding rapidly enough, the parties could come back to the district court at any time and ask for reconsideration in light of the speed with which state proceedings were or were not proceedings."
>
> *Judge Wallace*—"That wasn't in the written order."
>
> *Counsel*—"No, I think it was in the transcript of oral proceedings."

Counsel now concedes the transcript of oral proceedings before the district court does not contain such a statement. Nonetheless, he still asserts that the district court did inform the parties at some point that the Republicans could return to their federal forum if the state courts moved too slowly.

We will continue to credit this representation to the extent of denying a rehearing. Should, however, the Republicans attempt to return to the district court on this basis, only to have the district court rule that it never allowed for a return before the adjudication of the state law claims in state court, the Republicans may appeal to this court on an expedited basis without briefing, or petition for mandamus. It is clear that appellate courts retain the power to order a trial of issues in an abstaining district court if, after a reasonable time, the state courts have failed to act. *See NAACP v. Gallion*, 368 U.S. 16, 16-17 (1961) (per curiam). Any appeal or petition in this matter shall be assigned to this panel for immediate consideration.

S.F. 24638

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

BADHAM *et al.*

v.

MARCH FONG EU, ETC., *et al.*

[Filed Oct. 27, 1983]

The petition for writ of mandate is denied, as premature.

The issues presented are the subject of another action now pending in the United States District Court for the Northern District of California (Badham v. Eu, C-83-1126 RHS) in which that court's abstention order is not final. Petitioners' delay between June 10, 1983, and September 30, 1983, in seeking relief in this court has foreclosed reference for resolution of the disputed factual claims and disposition after briefing, argument, and preparation of an opinion by the November 1, 1983, date specified by petitioners. The relief requested is in any event inappropriate since, regardless of how the state law issues are resolved, time constraints might well necessitate use of the challenged congressional districts for the 1984 primary and general elections. (Assembly v. Deukmejian (1982) 30 Cal. 3rd 638, 660-661.)

The denial of this petition is without prejudice to the filing of a subsequent petition seeking relief in an appropriate court at such time as the abstention order becomes final.

/s/ Bird
Chief Justice

/s/ Mosk

/s/ Reynoso

/s/ Broussard

/s/ Kaus

/s/ Grodin

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7487

D.C. No. CV 83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

MARCH FONG EU, Secretary of State of the State of California,
Real Party in Interest.

Appeal from the United States District Court for the Northern District of California

Cecil F. Poole, Robert H. Schnacke, Alfonso J. Zirpoli, Judges, Presiding

Argued and Submitted August 10, 1983

[Filed Sept. 26, 1983]

Before: DUNIWAY, WALLACE, and PREGERSON, Circuit Judges.

OPINION

WALLACE, Circuit Judge:

Registered Republican voters in several congressional districts in the State of California (the Republicans) challenge California Assembly Bill 2X, a congressional redistricting bill, on several state and federal constitutional grounds. A statement of the facts is contained in the district court's disposition, which follows this opinion. Employing the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) (*Pullman*), the three-judge district court stayed the action pending resolution of the state law issues in state court. The district court retained jurisdiction to resolve any federal claims remaining following the state court adjudication. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-17 (1964). We affirm.

I

We are confronted initially with a question concerning the basis of our jurisdiction. The Republicans have filed both a notice of appeal under 28 U.S.C. § 1291 and a petition for mandamus under 28 U.S.C. § 1651. Determining which statute applies may be significant because on direct appeal we review the district court's order under an "abuse of discretion" standard, *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983) (*C-Y Development*), while under mandamus jurisdiction we employ a more stringent standard of review. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. 927, 933 n.6 (1983); *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978). Furthermore, me may not exercise mandamus jurisdiction over an action which is subject to direct appeal. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. at 933 n.6; *Helstoski v. Meanor*, 442 U.S. 500,

505-08 (1979); *Diamond v. United States District Court*, 661 F.2d 1198, 1198 (9th Cir. 1981).

Under some circumstances, a *Pullman* abstention order may be deemed a final order subject to direct appeal under 28 U.S.C. § 1291. *See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. at 933-34 (case involving *Colorado River* abstention); *Herrington v. County of Sonoma*, 706 F.2d 938, 939 (9th Cir. 1983); *C-Y Development*, 703 F.2d at 375 (assuming jurisdiction by direct appeal). Here, however, not only has the district court retained jurisdiction to resolve the remaining federal claims, but those federal claims are substantial and constitute the essential part of the Republicans' case. The question thus arises whether an abstention order is final under these circumstances. In a recent decision, the Supreme Court touched upon but did not provide a definitive answer to this specific question. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. at 933-34 & n.11.

We need not resolve the issue in this case, however, because jurisdiction clearly exists under one of the two statutes and we would affirm the district court's decision under either standard of review. We therefore proceed to the merits of the abstention issue.

II

To determine whether *Pullman* abstention is appropriate, the district court must apply a three-prong test:

> (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
>
> (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."

(3) The possibly determinative issue of state law is doubtful.

C-Y Development, 703 F.2d at 377, *quoting Canton v. Spokane School District No. 81*, 498 F.2d 840, 845 (9th Cir. 1974), *quoting Pullman*, 312 U.S. at 498.

Applying this test, the district court concluded that all three requirements have been met in this case. Essentially for the reasons stated by the district court, we agree. The primary dispute between the parties is whether the second *Pullman* requirement was met. Abstention under this requirement is appropriate if state court adjudication will obviate the need to decide all of the federal constitutional questions or "will substantially reduce the contours of such adjudication and place it in a different posture" as a result of which "the constitutional issues will have been substantially narrowed and refined." *C-Y Development*, 703 F.2d at 380. We conclude that the district court's decision should not be overturned on this issue.

In addition, however, the Republicans argue that *Pullman* abstention is not appropriate in a voting rights case, or in the alternative, that such cases require consideration of factors beyond the three basic requirements of *Pullman*. They stress that in this case, the congressional district boundaries must be established no later than December 15, 1983 in order to be in time for the 1984 elections. Thus, abstention and its attendant delay may here serve to invalidate the Republicans' federal voting rights. Although we disagree that these circumstances require us to reverse the district court's order, we agree that abstention orders in cases involving voting rights require special consideration.

We reject the Republicans' contention that *Pullman* abstention may not be applied in voting rights cases. We have stated "that there is no *per se* civil rights exception to the abstention doctrine." *C-Y Development*, 703 F.2d

at 381; *accord Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981) ("An alleged denial of voting rights does not, in itself, constitute a 'special circumstance' which automatically precludes federal court abstention."), *cert. granted*, 455 U.S. 937, *cert. dismissed*, 103 S. Ct. 368 (1982). Thus, the district court was correct in applying the three-part *Pullman* test to the case before it.

On the other hand, "the Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, . . . racial equality, . . . and first amendment rights of expression . . . ." *C-Y Development*, 703 F.2d at 381 (citing cases). Many courts have expressed concern that in some cases the delay caused by abstention may effectively deny plaintiffs their constitutional rights. *See, e.g., Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964).

The dangers posed by an abstention order are particularly evident in voting cases. The right to vote is "fundamental 'because [it is] preservative of all rights,'" *Harman v. Forssenius*, 380 U.S. 528, 537 (1965), *quoting Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In addition, delay in such cases is particularly insidious. In a redistricting case such as this, for example, the courts' failure to act before the next election forces voters to vote in an election which may be constitutionally defective. Although a subsequent court may strike down the apportionment plan, there is no procedure for removing from office the officials elected under the defective plan. Moreover, these officials may acquire advantages of incumbency that may be difficult for their opponents to overcome in future elections held under a constitutionally valid plan. Thus, a delayed decision in such a case "strike[s] at the heart of repre-

sentative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Given these special dangers of delay, courts have been reluctant to rely solely on traditional abstention principles in voting cases. In *Harman v. Forssenius*, the Supreme Court upheld a district court's refusal to abstain in a case involving a state poll tax. The Court based its decision first on traditional *Pullman* considerations, concluding that the state statutes were clear and unambiguous and that state court construction of the statutes would not materially alter the nature of the problem. 380 U.S. at 535-36.

The Court did not rest its decision on these grounds alone, however, and went on to state:

> In addition to the clarity of the Virginia statutes, support for the District Court's refusal to stay the proceedings is found in the nature of the constitutional deprivation alleged and the probable consequences of abstaining. The District Court was faced with two class actions attacking a statutory scheme allegedly impairing the right to vote in violation of Art. I, § 2, and the Fourteenth, Seventeenth and Twenty-fourth Amendments. . . . In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain.

380 U.S. at 537 (citations and footnotes omitted). Although *Harman* may be distinguished, the case demon-

strates the Supreme Court's concern over the special dangers inherent in applying abstention in voting cases. *See also O'Hair v. White*, 675 F.2d 680, 693-94 (5th Cir. 1982) (en banc); *Edwards v. Sammons*, 437 F.2d 1240 (5th Cir. 1971); *cf. Anderson v. Mills*, 664 F.2d 600, 603-04 (6th Cir. 1981).

The fundamental importance of the right to vote and the special dangers posed to that right by delay require a different approach to abstention orders in voting rights cases. We need not decide whether this different approach is in essence a separate requirement or merely a background against which to apply the traditional three-part test. We do hold that before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote. Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote.

It may not be necessary to refuse to abstain in order to mitigate the dangers of delay. Instead, the district court may fashion its order in a way to reduce those dangers. The district court has done so in this case. In orally announcing its decision in this case, the court stated that the Republicans could return to the federal court if they were unable to obtain a sufficiently swift adjudication of state claims in the state courts. Thus, the Republicans were given the opportunity to petition the federal court if it becomes apparent that federal constitutional rights are endangered by the abstention order. Although the district court could have set a specific date by which the parties would have been required to return so that the district court could determine if the state court proceedings were progressing swiftly enough,

reposing responsibility with the parties to advise the court is a reasonable alternative.

The district court's consideration of the delay factor and its decision whether to limit the length of time it is willing to defer are, like its ultimate decision based on the three traditional *Pullman* requirements, committed to the sound discretion of the district court. Here, the district court not only considered the deleterious effects of delay, but took affirmative steps to ameliorate the problem. In doing so, it adhered to established principles of federalism while also protecting the federal constitutional right to vote of California citizens. Under either applicable standard of review, we affirm its decision. The district court's abstention will have no immediate significant effect on federal voting rights. The deadline is December 15, 1983—six months after the abstention order. Therefore, as the matter presently stands, there is no immediate need for federal intervention.

Defendants argue that the Republicans themselves have been guilty of delay and have not pursued diligently their claims in state court. They contend further that absent such delaying tactics, the Republicans would have already had a swift resolution of their state law claims in state court. The argument is premature. Clearly, the district court's permission for the parties to return to federal court if necessary is predicated on a good faith effort to obtain a disposition of the state law issues in state court. Thus, if the Republicans later seek to obtain a ruling by the district court prior to action by the state courts, the district court must examine any allegations that the Republicans have not acted in good faith, especially during the time period following its abstention order. The issue will be ripe at that time.

III

After the district court issued its opinion in this case, the Republicans petitioned the court to reconsider its de-

cision in light of *Karcher v. Daggett*, 103 S. Ct. 2653 (1983). The district court subsequently entered an order stating that its decision was not affected by the Supreme Court's decision. We agree that *Karcher* does not affect the validity of the district court's order.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,
Plaintiffs,

vs.

MARCH FONG EU, Secretary of State of the State of California,
Defendant,

ASSEMBLY OF THE STATE OF CALIFORNIA and THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,
Defendant-Intervenors.

[Filed June 20, 1983]

MEMORANDUM OPINION

Plaintiffs, registered Republican voters in several congressional districts in the State of California, challenge California Assembly Bill 2X ("A.B.2X"), a congressional redistricting bill, on several state and federal constitutional grounds.

A.B.2X was passed by the California Senate and Assembly on December 30, 1982. Its passage was necessary because a predecessor redistricting bill, A.B. 301, had

been rejected by the voters in a referendum held earlier in 1982, on June 8. The Governor signed A.B.2X on January 2, 1983, and it was chaptered. On January 5, the Elections Division of the Office of the Secretary of State transmitted copies of the chaptered bill to all Registrars of Voters and County Clerks.

Plaintiffs claim that A.B.2X involved population deviations of 3.283%, in violation of Article I, § 2 of the Constitution of the United States. Those population deviations were purportedly reduced, however, by a series of rather substantial changes made in the law after its passage. On February 22, 1983,[1] a staff member of the Assembly Elections and Reapportionment Committee delivered a list of what the defendants and intervenors call "technical corrections" and census tract maps outlining the changes to the Office of the Secretary of State. The Secretary directed the changes and maps to the Registrars of Voters and County Clerks with the expectation that they will be implemented. These changes reduce the population deviation to .0538% by transferring over 39,000 persons between congressional districts. For example, the most populous district, District 16, transferred 8,593 persons to District 12, the least populous district. Plaintiffs claim that the changes were substantial and illegal. They particularly complain of the transfer between District 16 and District 12, because an amendment made to the bill just before passage, sponsored by Senator Mello, had transferred 8,576 persons from District 12 to District 16, resulting in the large deviation contained in the chaptered bill.

The plaintiffs' amended complaint, filed on March 31, 1983, alleges that A.B.2X and the "technical corrections"

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[1] This action was begun on March 4, 1983; there apparently was no public notice of the purported changes until some date thereafter, when the Secretary of State sent them to the various county officials. Thereafter plaintiffs filed their amended complaint.

made to it violate several state and federal constitutional provisions. The state constitutional violations alleged include: (1) the "technical corrections" implemented by the Secretary of State violate Article III, § 3 and Article XXI, § 1 because the Secretary is usurping the role of the legislature; (b) the reapportionment plan was enacted in violation of Article IV, § 8 because the "three-reading" rule was not followed; (3) the plan violates Article II, § 9 because it contravenes the voters' intent in rejecting Proposition 10 on the June 1982 ballot; (4) the plan violates Article XXI because it does not respect city and county units and contains non-contiguous districts.

Plaintiffs allege the following federal constitutional violations: (1) the "technical corrections" implemented by the Secretary of State violate due process and equal protection; (2) the reapportionment plan's deviation percentage exceeds constitutional limits whether it is the 3.283% under A.B.2X as chaptered or .0538% as implemented by the Secretary; (3) the plan is a political gerrymander.

Because the complaint contained both state and federal claims, the defendant and defendant-intervenors brought motions asking the three-judge court to abstain from deciding the state law issues under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

In the Ninth Circuit, *Pullman* abstention is appropriate when a three-prong test is satisfied: (1) The complaint "touches a sensitive issue of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." (2) "Such constitutional adjudication can be avoided if a definitive ruling on the state issue would terminate the controversy." (3) The possible determinative issue of state law is doubtful. *See C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983); *Canton v. Spokane School District No.*

81, 498 F.2d 840, 845 (9th Cir. 1974), *quoting Railroad Commission v. Pullman Co.*, 312 U.S. at 498.

(1) Sensitive issue of social policy.

Reapportionment, which is carried out by the states, is an area in which state courts are encouraged to require and formulate valid plans. *See Scott v. Germano*, 381 U.S. 407, 409 (1965) (district court should have stayed hand when Illinois Supreme Court had found the composition of the Illinois Senate invalid and retained jurisdiction to ensure a valid plan was created). The fact that a congressional apportionment, as opposed to a state legislative apportionment, is at issue in this case does not make the issue less sensitive. In both cases the federal one-person, one-vote rule applies. *See Reynolds v. Sims*, 377 U.S. 533 (1964). In both cases, the Supreme Court has found that courts should defer to efforts by the legislature, as long as they are constitutional, when adopting redistricting plans. *See Upham v. Seamon*, 456 U.S. 37, 41 (1982); *White v. Weiser*, 412 U.S. 783, 794-95 (1973) ("In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'") (*quoting Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Although the plaintiffs argue that three-judge courts have not abstained in congressional reapportionment cases, none of the cases cited by plaintiffs involved state law issues that would obviate or alter the federal constitutional issue (the second *Pullman* criteria). *See Flateau v. Anderson*, 537 F.Supp. 257 (S.D.N.Y. 1982); *In re Congressional Districts Reapportionment Cases* (N.D.Ill. 1982) (Exhibit C to Plaintiffs' Opposition to Motion to Abstain); *In re Pennsylvania Congressional Districts Reapportionment Cases*, 535 F.Supp. 191 (M.D. Pa. 1982); *Carstens v. Lamm*, 543 F.Supp. 68 (D.Colo. 1982).

(2) Avoidance or alteration of the federal constitutional issue.

To satisfy the second prong of the *Pullman* criteria, a state court determination need not entirely avoid the federal issue. It is enough that it materially alter the nature of the federal constitutional question. *See C-Y Development Co. v. City of Redlands*, 703 F.2d at 377-380 (abstention might avoid deciding proper remedy for permanent deprivation of property rights, leaving only question of remedy for temporary taking); *see also Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976) ("abstention is appropriate where [deferral to the state courts] '. . . might avoid in whole or in part the necessity for federal constituitonal adjudication, or at least materially change the nature of the problem.'") (*quoting, Harrison v. NAACP*, 360 U.S. 167, 177 (1959)).

In this case, an issue of state law presents a threshold question which will materially alter the federal constitutional question presented. The plaintiffs have claimed in Count VII of their complaint that the "technical corrections" implemented by the Secretary of State violate the state constitution. A decision on this state law issue will determine whether the three-judge court reviews the reapportionment plan with or without the challenged changes. With the changes the reapportionment plan, according to defendants, has a population deviation of only .0538%—a deviation percentage below that which the Supreme Court has found constitutional.[2] The unchanged, or original plan, in contrast, is more in doubt. Its population deviation of 3.283% comes closer to deviations found

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[2] There is no total percentage deviation that automatically makes a reapportionment plan constitutional. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). The plan must achieve one-person, one-vote as nearly as practicable. *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The Supreme Court, however, has approved a plan with a total percentage deviation of .149%. *See White v. Weiser*, 412 U.S. 783, 786, 796 (1973).

constitutionally violative.[3] Since this case presents a state law issue which will materially alter the federal constitutional issue, the second prong of *Pullman* is satisfied.

This case also presents three state constitutional law questions that may obviate the federal constitutional issue. Plaintiffs argue that the reapportionment plan violates the "three-reading" rule (Article IV, § 8); that it contravenes the voters' intent in rejecting Proposition 10 (Article II, § 9); and that the plan does not respect city and county units and is non-contiguous (Article XXI). If A.B.2X is found invalid because it violates the California Constitution for any of the above reasons, the federal constitutional questions will become moot. These state law issues thus provide additional reasons for finding the second prong of *Pullman* satisfied.

(3) Doubtfulness of the state law issues.

To satisfy the third prong of *Pullman*, the possibly determinative state law issues must be doubtful. *See C-Y Development Co. v. City of Redlands*, 703 F.2d at 380-381; *Pue v. Sillas*, 632 F.2d 74, 78-79 (9th Cir. 1980). A state law issue is doubtful if it is "susceptible" of an interpretation that would avoid or modify the federal constitutional question. *See Babbitt v. Farm Workers*, 442 U.S. 289, 306 (1979); *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976).

The legality of the Secretary of State's implementation of the changed reapportionment bill is an issue of first

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[3] A total percentage deviation of 4.13% has been found to violate the constitution. *See White v. Weiser*, 412 U.S. 783, 785, 790-91 (1973). One three-judge panel has *approved* a plan with a percentage deviation of 3.79%. *See Drum v. Scott*, 337 F.Supp. 588 (M.D.N.C. 1972). However, the fact that the legislative committee was able to draft a plan with a lower percentage deviation makes A.B.2X's 3.238% deviation suspect. *See White v. Weiser*, 412 U.S. at 790 (the existence of proposed plans with lower total deviations indicated that it was possible and practicable to construct a redistricting scheme with lower populations among districts).

impression in California. No California case law or state statute provides a clear answer.

Plaintiffs argue that the "technical corrections" are in fact substantive amendments to A.B.2X and constitute an unconstitutional exercise by the Secretary of the Legislature's power to redistrict. They allege that the Secretary's implementation violates Article XXI, § 1 of the California Constitution ("In the year following the year in which the national census is taken . . . , the Legislature shall adjust the boundary lines of the . . . Congressional . . . districts . . . ."). They also allege that the Secretary is in violation of Article III, § 3 ("The powers of the state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

Defendants offer two theories in response, arguing that California Supreme Court precedent allows a reapportionment statute to be construed to include technical corrections; and that Cal.Election Code § 30000 permits them. Neither theory is without doubt, however. In adopting temporary reapportionment plans, the California Supreme Court has allowed incorporation of technical corrections in order to carry out legislative intent. *See Silver v. Brown*, 63 Cal.2d 841, 844-46, 48 Cal.Rptr. 609, 409 P.2d 689 (1966) (maps and census tracts contained errors which constituted a departure from the legislative history); *Legislature v. Reinecke*, 6 Cal.3d 595, 604, 99 Cal. Rptr. 481, 492 P.2d 385 (1972) (*Reinecke I*) (18 clerical errors corrected because the language of the legal descriptions departed from the maps and computer printouts relied upon by the legislature in passing the bill). It has also allowed clerical corrections made by special masters who drew up a reapportionment plan. *See Legislature v. Reinecke*, 10 Cal.3d 396, 401, 110 Cal.Rptr. 718, 516 P.2d 6 (1973) (*Reinecke IV*). And, the court has allowed the temporary use of a judicial plan which

included, according to defendants, corrections somewhat similar to those made in the plan at issue here. *See Assembly v. Deukmejian*, 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939 (1982). *Silver*, *Reinecke I*, and *Reinecke IV*, however, were not faced with the question at issue here: whether post-enactment changes, including shifts in population among districts to more closely comply with the one-person, one-vote standard, can be made other than by the legislature, particularly when there is evidence that legislative intent may have been something quite different. And *Deukmejian* expressly did not pass on the merits of the apportionment plan implemented by that case.

The application of Election Code § 30000 is similarly doubtful here. The statute provides:

> "Any maps describing the boundaries of the districts, as contained in this division, which have been prepared by the Legislature or a committee of the Legislature in connection with the enactment of this division may be deposited with the Secretary of State in order to illustrate the boundary lines set forth in this division. Maps deposited with the Secretary of State pursuant to this section may be used by the Secretary of State and the several county clerks for the purposes of assisting in the interpretation of this division and to facilitate the Secretary of State and county clerks in their administrative functions involved in the conduct of elections."

Plaintiffs argue that Election Code § 30000 does not permit the Secretary to adopt congressional districts that depart from the language of the bill as chaptered. Defendants offer a different interpretation. They argue that the statute's provision for the Secretary's interpretation is license for departure from the literal words of the bill as chaptered; that the Secretary has interpreted the bill to include the "technical corrections" and that her interpretation should be given deference; and that the legislature passed this statute with the knowledge that its identical

predecessor had been interpreted similarly. These differing constructions of the statute put its application to this case in doubt.

Since Election Code § 30000 may be "susceptible" of an interpretation that would modify the federal constitutional question, the third prong of the *Pullman* test is satisfied.

Some of the other state law issues involved in this case are also doubtful. Plaintiffs argue that A.B.2X is void because it violates the "three-reading" rule of Article IV, § 8 of the California Constitution. It will be necessary to decide whether *People v. Peete*, 54 Cal.App. 333, 369 (1921) (rejecting a challenge to an earlier three-reading rule) controls the present case.

Plaintiffs also attack A.B.2X as violative of Article II, § 9 of the constitution because it contravenes the voters' intent in rejecting Proposition 10. The California Supreme Court has said the new measure must be "essentially different" from the rejected provision and enacted "not in bad faith, and not with intent to evade the effect of the referendum petition." *Assembly v. Deukmejian*, 30 Cal.3d at 678. Lower California courts have applied this test. *See Martin v. Smith*, 176 Cal.App.2d 115, 119-21, 1 Cal.Rptr. 307 (1959). In *Martin*, application involved comparing the two bills, discerning the intent of the voters in rejecting the first bill, and assessing the legislature's motive in passing the second bill. The outcome of such an inquiry is certainly not clear, and in any event, involves sensitive issues of state policy.

Plaintiffs' final state law argument is that the A.B.2X is invalid because it does not respect city and county units and is noncontiguous. Although a recent case discusses similar issues in assessing a reapportionment plan, *see Carstens v. Lamm*, 543 F.Supp. 68, 82 (D.Colo. 1982), the plaintiffs are alleging a violation of Article XXI, § 1, which has yet to be interpreted by a state court.

The rationale of *Pullman* applies most persuasively here. We shall abstain until the state law issues are settled by the state court. We shall, however, retain jurisdiction to resolve whatever federal issues remain.

Dated:

/s/ Cecil F. Poole
CECIL F. POOLE
United States Circuit Judge

/s/ Alfonso J. Zirpoli
ALFONSO J. ZIRPOLI
United States District Judge

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
United States District Judge

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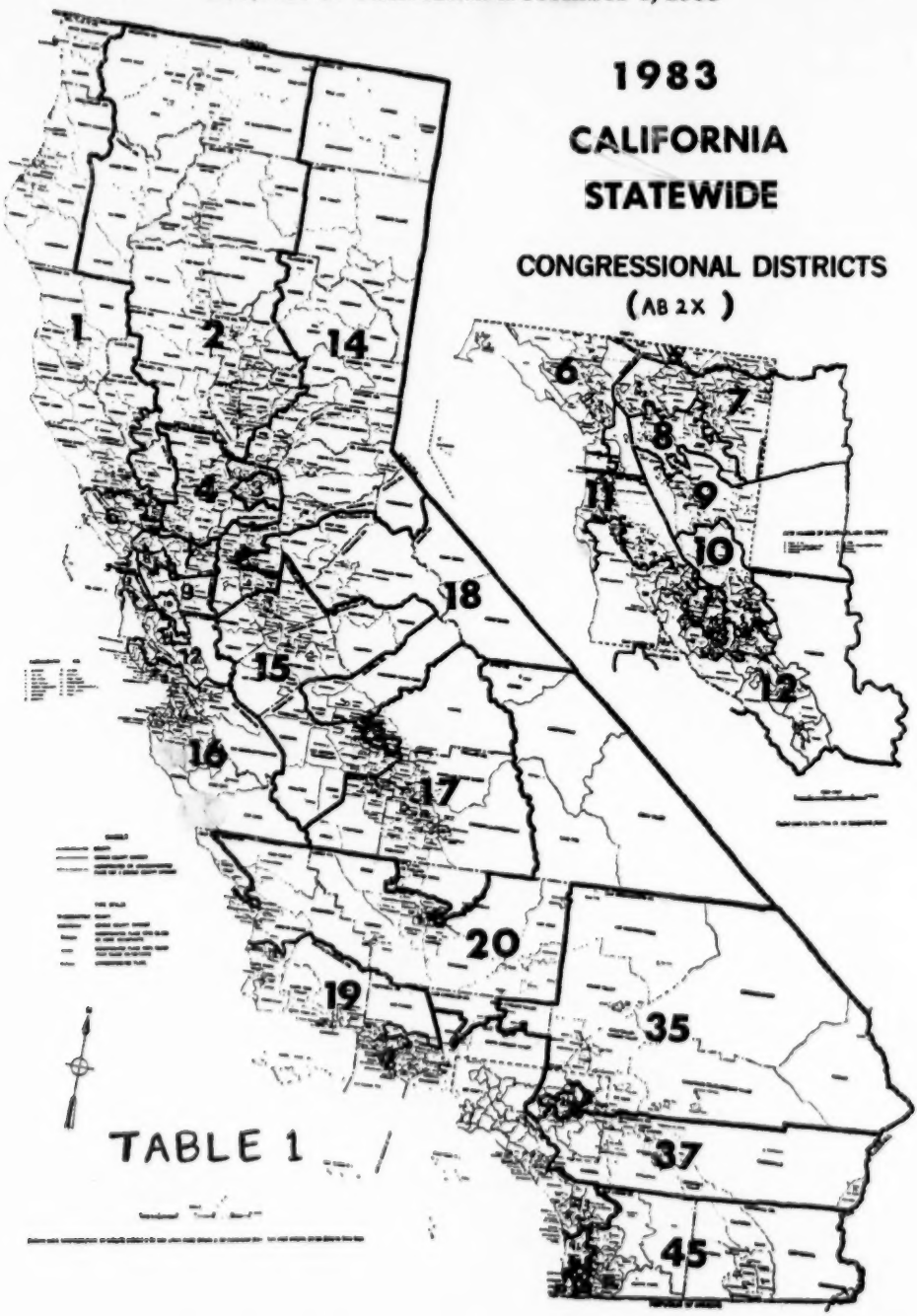
EXHIBITS 1 THROUGH 6

Reproduced from Petitioners Exhibits to Memorandum of Points and Authorities in Support of Preliminary Injunction Submitted to United States District Court for the Northern District of California December 8, 1983



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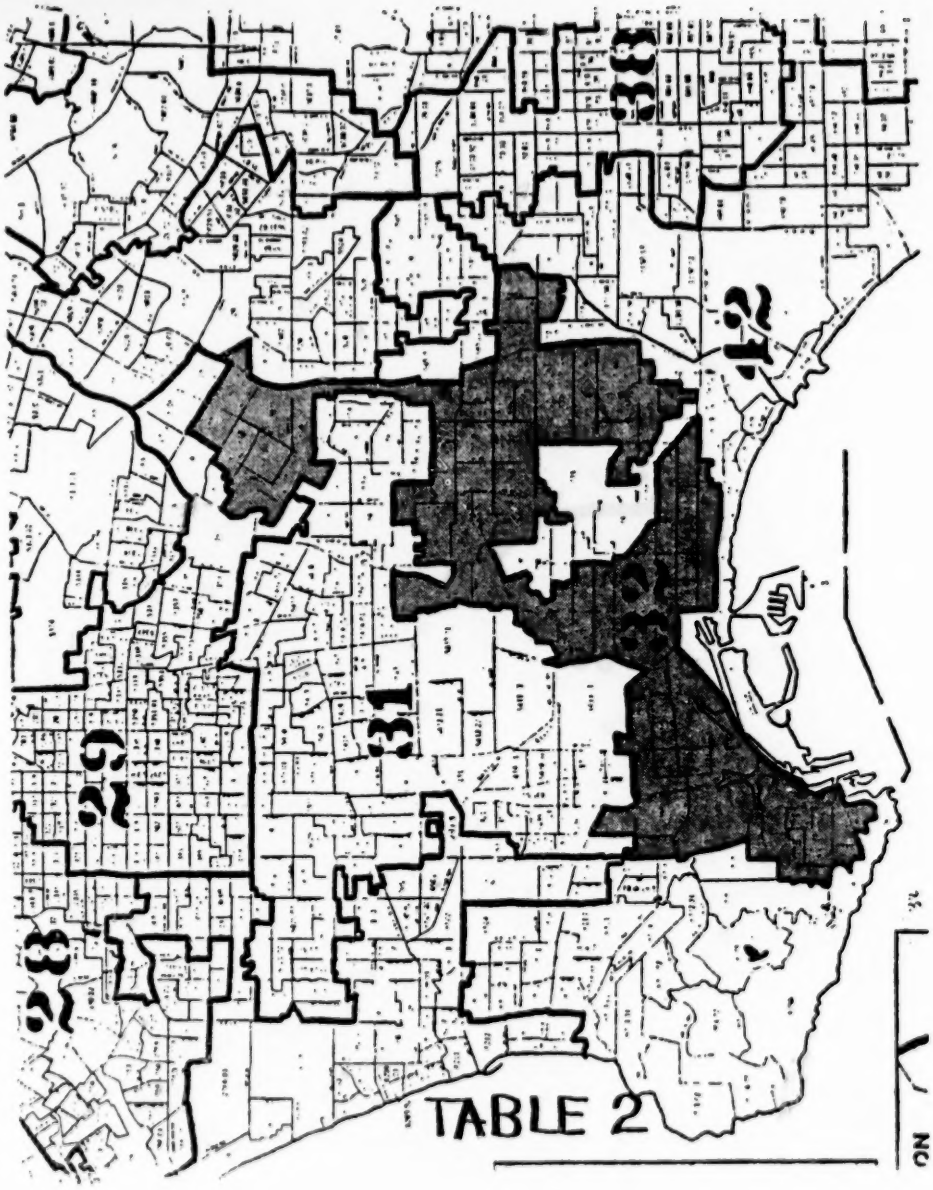

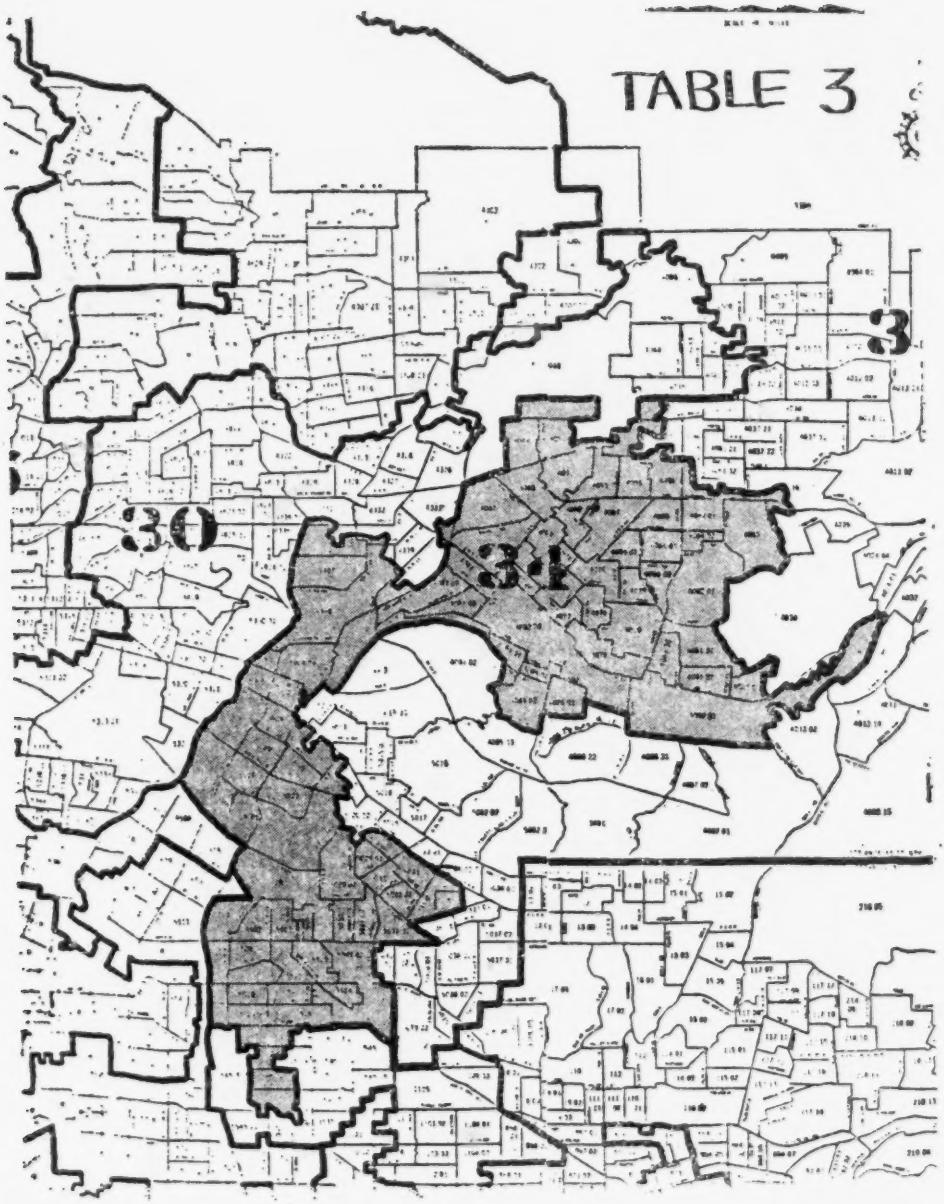

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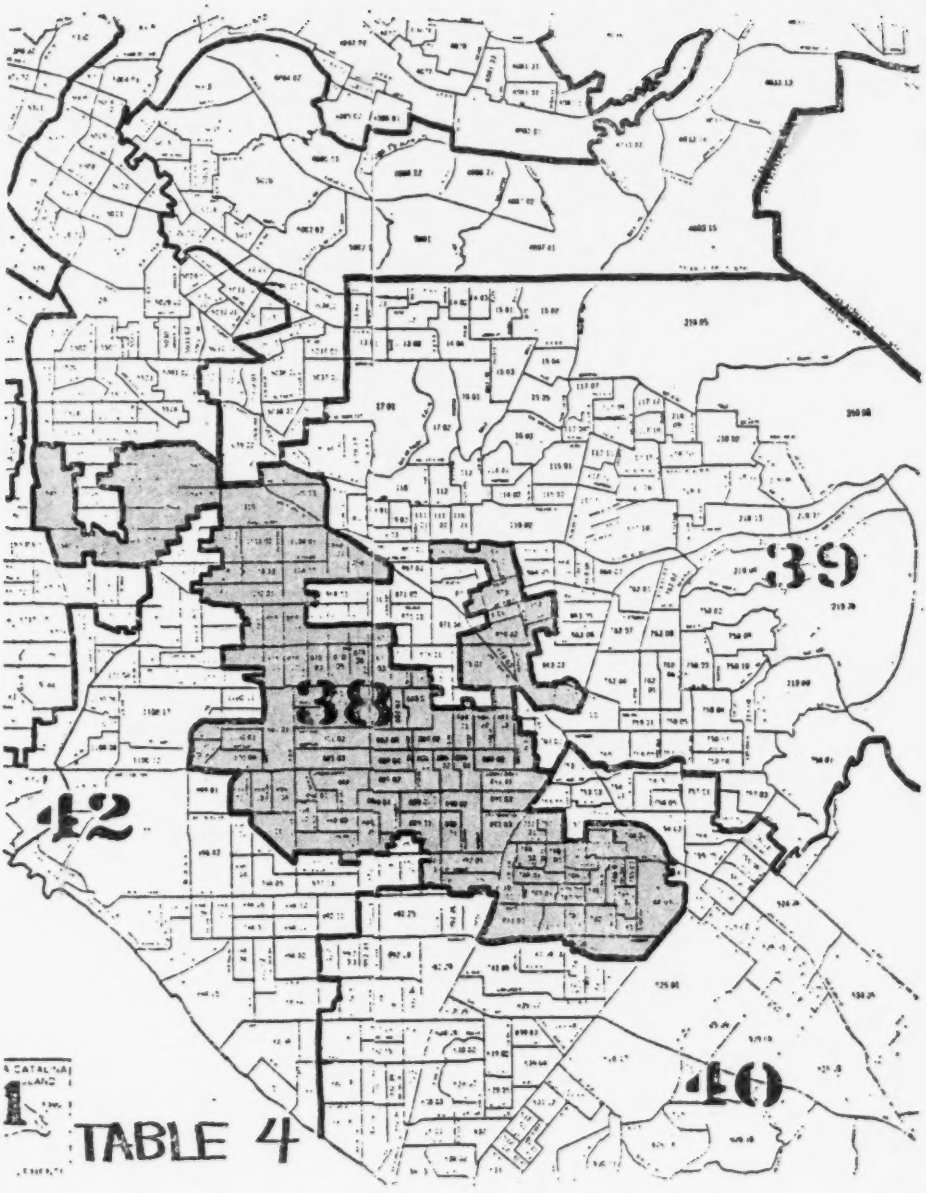

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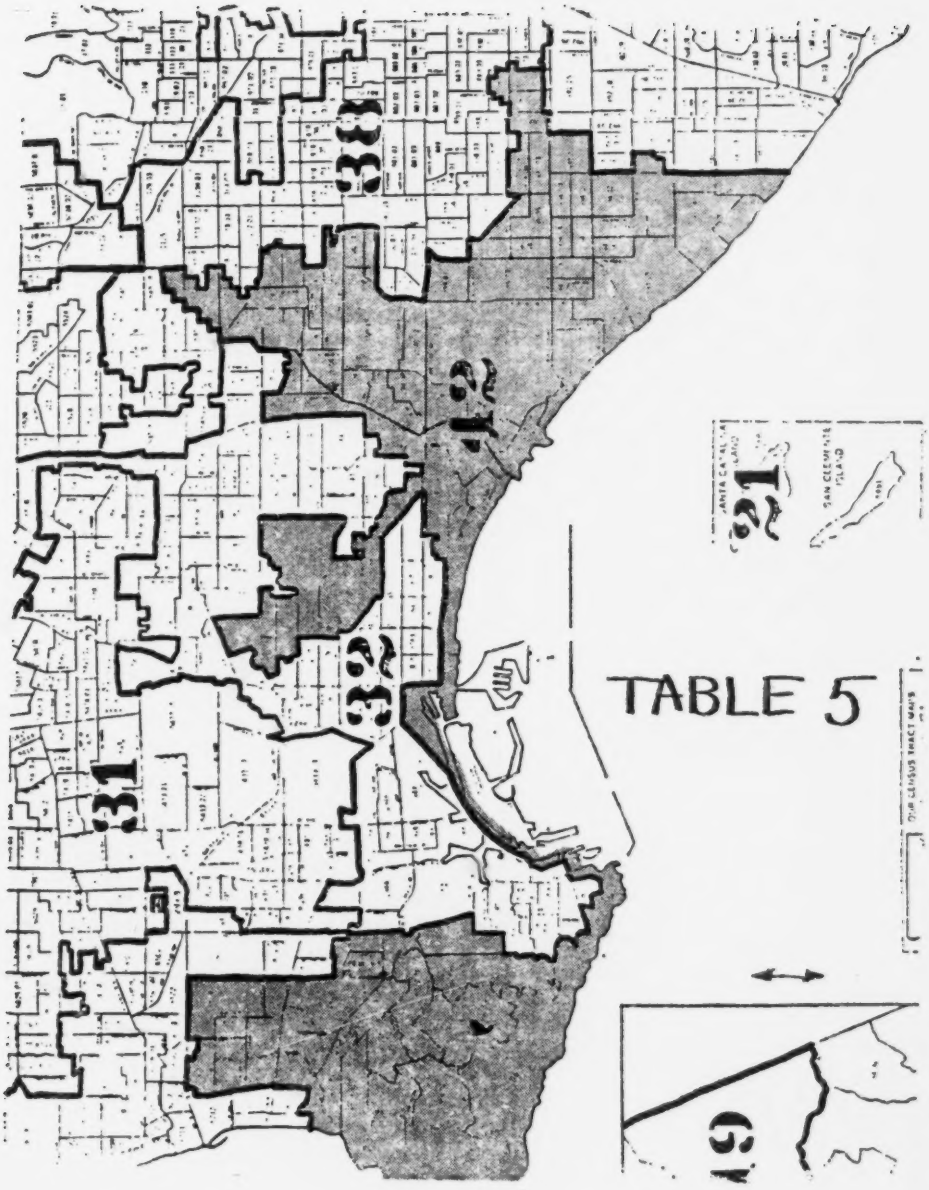

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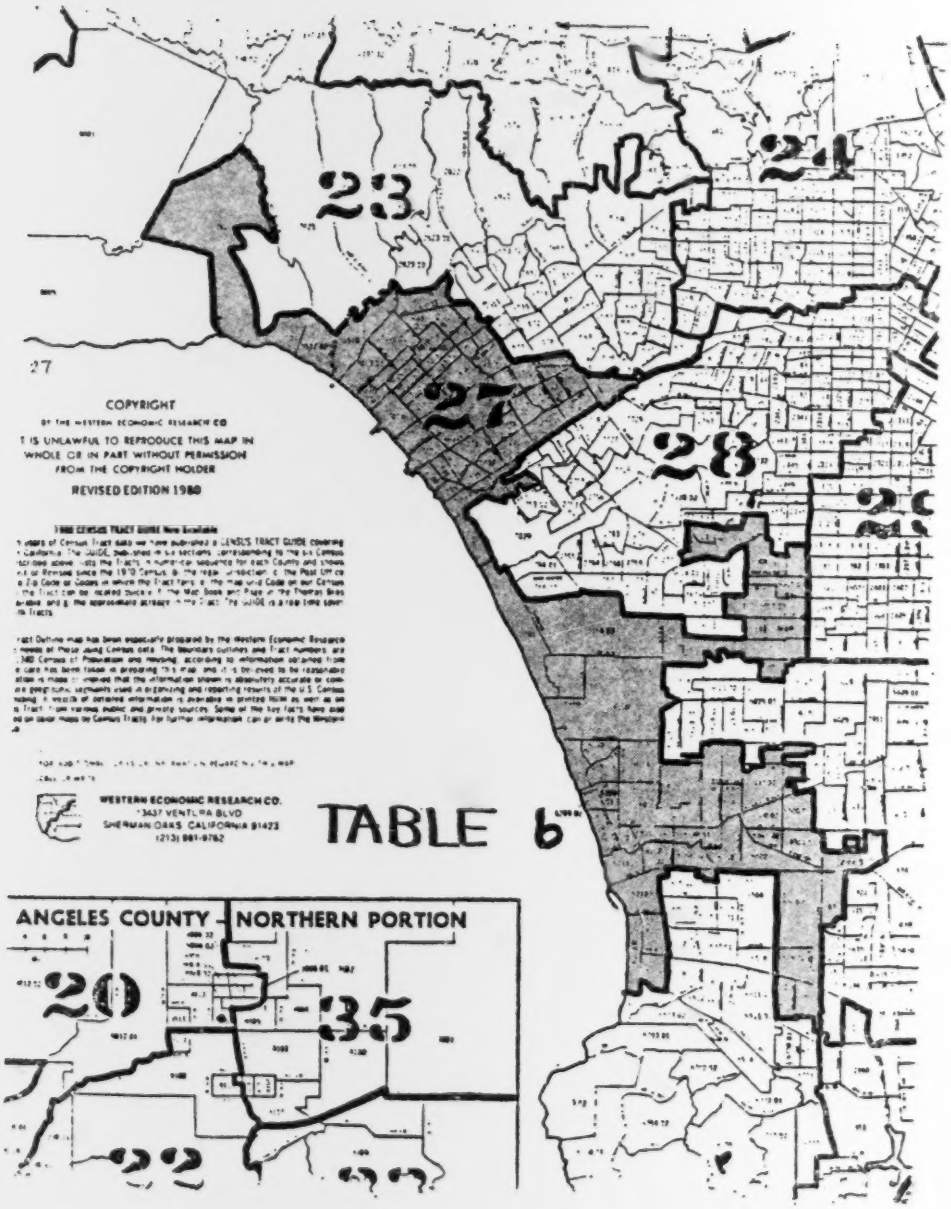
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TABLE 6
ANGELES COUNTY - NORTHERN PORTION
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1984 CALIFORNIA CONGRESSIONAL ELECTIONS
SEMI-OFFICIAL RESULTS *

	District	Incumbent	Winner	Net Change	Democratic Vote	Republican Vote	Other Vote	Total Vote	Margin Of Victory (%)	Democrat Percentage	Republican Percentage	Others
CA	3	D	D		125,309	0	0	125,309	100.0	100.0	0.0	0.0
CA	35	R	R		0	172,651	29,480	202,131	85.4	0.0	85.4	14.6
CA	22	R	R		0	178,782	30,988	209,770	85.2	0.0	85.2	14.8
CA	29	D	D		106,494	16,289	0	122,783	73.4	86.7	13.3	0.0
CA	28	D	D		109,753	32,225	2,818	144,796	53.5	75.8	22.3	2.0
CA	39	R	R		53,546	170,250	0	223,796	52.2	23.9	76.1	0.0
CA	45	R	R		44,420	145,014	3,857	193,291	52.0	23.0	75.0	2.0
CA	43	R	R		49,525	159,315	6,608	215,448	50.9	23.0	73.9	3.1
CA	14	R	R		57,263	175,631	6,708	239,602	49.4	23.9	73.3	2.8
CA	5	D	D		137,763	45,178	7,459	190,400	48.7	72.4	23.7	3.9
CA	25	D	D		71,756	23,717	4,224	99,697	48.2	72.0	23.8	4.2
CA	42	R	R		58,161	171,142	5,629	234,932	48.0	24.8	72.8	2.4
CA	21	R	R		60,655	168,765	4,250	233,670	46.2	26.0	72.2	1.8
CA	17	R	R		47,138	125,346	0	172,484	45.4	27.3	72.7	0.0
CA	33	R	R		52,925	142,951	6,892	202,768	44.4	26.1	70.5	3.4
CA	9	D	D		135,316	50,711	7,315	193,342	43.8	70.0	26.2	3.8
CA	16	D	D		149,252	58,385	3,231	210,868	43.1	70.8	27.7	1.5
CA	44	D	D		97,467	38,961	3,130	139,558	41.9	69.8	27.9	2.2
CA	20	R	R		58,233	142,186	0	200,419	41.8	29.1	70.9	0.0
CA	11	D	D		146,131	59,125	3,843	209,099	41.6	69.9	28.3	1.8
CA	31	D	D		97,972	40,440	0	138,412	41.6	70.8	29.2	0.0
CA	2	R	R		68,930	156,758	0	225,688	39.0	30.5	69.5	0.0

CA	6	D	D		159,727	69,518	5,488	234,733	38.4	68.0	29.6	2.3
CA	19	R	R		67,938	146,161	4,015	218,114	35.9	31.1	67.0	1.8
CA	18	D	D		125,178	60,808	0	185,986	34.6	67.3	32.7	0.0
CA	7	D	D		154,846	76,877	0	231,723	33.6	66.8	33.2	0.0
CA	15	D	D		106,518	53,078	3,067	162,663	32.9	65.5	32.6	1.9
CA	13	D	D		136,936	69,180	3,740	209,856	32.3	65.3	33.0	1.8
CA	24	D	D		93,811	48,751	5,012	147,574	30.6	63.6	33.0	3.4
CA	40	R	R		84,622	158,455	3,837	246,914	29.8	34.3	64.2	1.5
CA	41	R	R		83,552	156,554	7,114	247,220	29.4	33.8	63.3	2.9
CA	10	D	D		100,368	55,238	5,311	160,917	28.0	62.4	34.3	3.3
CA	37	R	R		83,932	146,196	0	230,128	27.0	36.5	63.5	0.0
CA	26	D	D		113,722	66,896	0	180,618	26.0	63.0	37.0	0.0
CA	12	R	R		88,368	150,144	5,663	244,175	25.3	36.2	61.5	2.3
CA	23	D	D		136,110	80,523	3,374	220,007	25.3	61.9	36.6	1.5
CA	4	D	D		127,133	75,522	3,934	206,589	24.9	61.5	36.6	1.9
CA	1	D	D		153,422	92,676	0	246,098	24.6	62.3	37.7	0.0
CA	32	D	D		99,472	59,860	4,394	163,726	24.2	60.8	36.6	2.7
CA	8	D	D		142,349	92,913	0	235,262	21.0	60.5	39.5	0.0
CA	34	D	D		85,033	56,786	0	141,819	20.0	60.0	40.0	0.0
CA	36	D	D		103,076	78,904	0	181,980	13.2	56.6	43.4	0.0
CA	27	D	D		101,922	83,719	6,443	192,084	9.5	53.1	43.6	3.3
CA	30	D	D		62,837	52,205	5,897	120,939	8.8	52.0	43.2	4.9
CA	38	D	R	+1	71,288	84,131	2,943	158,362	8.1	45.0	53.1	1.9

	DEMOCRATS	REPUBLICANS	OTHERS
TOTAL VOTE	4,210,169	4,288,917	196,664
% OF TOTAL VOTE	48.4%	49.3%	2.3%
% OF DISTRICTS WON	60%	40%	0%

* Source: Secretary of State of California